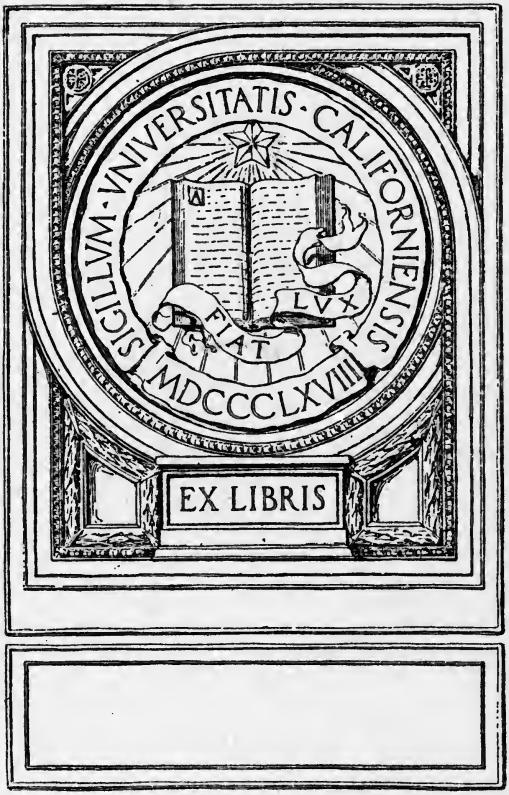
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THE ARMY AND THE LAW

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THE ARMY AND THE LAW

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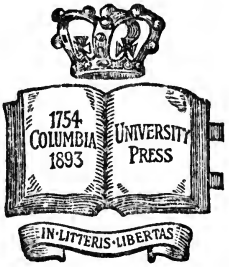

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PREFACE

This book deals with the army only in its relation to the common law which governs the general public, and with the soldier only in so far as his activities are, in point of law, of interest to non-military persons. It is an endeavor simply to assemble the principles of law which impose duties upon the civilian, citizen, or enemy, quite as much as they give him rights which the army must observe. Hence I do not treat of the rules governing the internal affairs of the army except in so far as they bear on its rights and obligations with respect to people who are not members of its personnel. For the same reason, I have avoided mention of the laws of war, and matters of strict international law, beyond such passing reference as might be necessary to indicate the boundaries of the jurisdiction of common law courts. Jurisdiction, as the Supreme Court has said, means simply the power to decide a case;[1] and many controversies are possible with respect to the army which common law courts cannot decide. All such matters I have endeavored to classify as non-justiceable, and to say no more about them than might be necessary for purposes of classification. Such is my appointed path, and for all deviations from it my apologies are tendered in advance.

My thanks are due to all those who took a kindly interest in this work during its progress, including my partners and Dean Stone of Columbia Law School. My brother-in-law, Colonel S. J. B. Schindel, U. S. A., and my partner, Mr. C. R. Ganter, were also kind enough to read the advance proofs and make valuable suggestions thereon.

GARRARD GLENN

New York, July, 1918

[1] The Fair *v.* Kohler C., 228 U. S. 22; 33 Sup. Ct. Rep. 410.

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I

INTRODUCTORY

The protection of the State from the public enemy, using that term in its broadest aspect, as distinguishing the public enemy from the casual malefactor, has always belonged to an organized force of armed men who in their collective aspect embody the physical force of the nation. This implies several things. First, the actions of this collective body must be governed by some sort of directions issuing from some power of State; and for convenience these directions are disseminated, through repetition or amplification, by various subordinate agents forming part of the force. Hierarchy is, therefore, inseparable from the idea of control. From this logically flows a duty of obedience to these directions on the part of the various members of the force.[1] Finally, an army, whether created for a par-

[1] The following expressions from the Army Regulations contain the whole duty of man in this respect:

"Command is exercised by virtue of office and special assignment of officers holding military rank who are eligible by law to exercise command. Without orders from competent authority an officer cannot put himself on duty by virtue of his commission alone, except as contemplated in the twenty-fourth and one hundred and twenty-second articles of war." Art. IV, Command.

"All persons in the military service are required to obey strictly and to execute promptly the lawful orders of their superiors.

"Military authority will be exercised with firmness, kindness and justice. Punishments must conform to law and follow offenses as promptly as circumstances will permit.

"Superiors are forbidden to injure those under their authority by tyrannical or capricious conduct or by abusive language. While maintaining dis-

ticular purpose, standing as a skeleton organization, or with all its *cadres* filled, is a necessity. It may not be a permanent institution with depots and headquarters in time of peace, but if it be dissolved it will, in case of subsequent need, be succeeded by another body of like organization.

It is obvious that the existence of any such body, whether regular or intermittent, will result in certain customs being more or less recognized as governing the conduct of the members of the force in matters not covered by express directions or orders. And thus a system of precedent, custom or tradition, call it what you will, evolves, which plays its part in the government of the army.

Such a body of law will naturally vary in application according to the activities of the army. In short, there may be a military law governing the army in time of peace, and an additional law which comes into existence when the activities of the army extend into the field of war.

cipline and the thorough and prompt performance of military duty, all officers, in dealing with enlisted men, will bear in mind the absolute necessity of so treating them as to preserve their self-respect. Officers will keep in as close touch as possible with the men under their command and will strive to build up such relations of confidence and sympathy as will insure the free approach of their men to them for counsel and assistance. This relationship may be gained and maintained without relaxation of the bonds of discipline and with great benefit to the service as a whole. C. A. R., No. 35.

"Courtesy among military men is indispensable to discipline; respect to superiors will not be confined to obedience on duty, but will be extended on all occasions.

"Deliberations or discussions among military men conveying praise or censure, or any mark of approbation, toward others in the military service, and all publications relating to private or personal transactions between officers, are prohibited. Efforts to influence legislation affecting the army, or to procure personal favor or consideration, should never be made except through regular military channels; the adoption of any other method by any officer or enlisted man will be noted in the military record of those concerned." Art. I, Military Discipline.

Wherever we have what can be called law of any sort we cannot go far without the idea of its enforcement, by means of some court having power to hear anyone accused of a breach of the law, and to order his punishment in case he is adjudged guilty. The army could not exist without that power any more than a court could exist without the self-protective right of punishing for contempt.

The proper understanding of such orders, the best interpretation of tradition, and the wisest discernment of customs, obviously would belong to those who are members of this force. It would, therefore, seem that courts created from among the personnel of the organization should be left alone in their administration of its system of law. Nor has it ever been doubted by the common law that entry into the army is more than a matter of contract; it is a change of status on the part of the entrant, and means his subjection to the laws and customs governing the army.[2] These factors make powerfully for segregation, and the creation of a system of jurisprudence administered exclusively by military courts.

There is such a system; and it forms no part of that common law which governs the community at large and is enforced by courts of general jurisdiction. But the law governing the army is not all to be found in the decisions of military courts, the Articles of War or the regulations and general orders, nor yet is it bounded by military tradition. The common law plays its part there as well, so important a part, indeed, as to make

[2] *In re* Morrissey, 137 U. S. 157, 11 Sup. Ct. Rep. 57. *In re* Grimley, 137 U. S. 147, 11 Sup. Ct. Rep. 54.

the relation of our military establishment to the law of the land a matter of distinct interest to all members of the public.

To define this relation of the common law to the army will be the function of the ensuing chapters. At the moment, however, it would seem in order to ask why there should be any such relation at all.

The answer is to be found in that guiding constitutional principle which, recognized in all English speaking countries, is expressed by a great English writer as amounting to the reign of law. It involves, to follow his thought, two principles, first, the absence of arbitrary power on the part of the government, and second, that every man is subject to ordinary law administered by ordinary tribunals.[3] While the entry of the candidate or recruit into the army, whether by way of his receiving a commission or becoming enlisted in the ranks, involves a consent to the powers of the army's own courts, that consent cannot affect the rights of a fellow-citizen who has not likewise taken on himself the military estate. To that extent, therefore, the position of a soldier is defined "by the principle that though a soldier is subject to special liabilities in his military capacity, he remains while in the ranks, as he was when out of them, subject to all the liabilities of an ordinary citizen."[4] This statement, be it noted, is not quite accurate, for, as we shall see, the definition of the soldier's

[3] Dicey, Law of the Constitution, 8th ed., pp. 183, 189.

[4] Dicey, *op. cit.* 282. "Since much has been said about soldiers, I will correct a strange mistaken notion which has got abroad, that because men are soldiers they cease to be citizens; a soldier is gifted with all the rights of other citizens, and is bound to all the duties of other citizens." Sir James Mansfield, C. J., in Burdett *v.* Abbot, 4 Taunt. 401.

liabilities does not ignore the fact of his being a soldier; on the contrary, that fact may be quite important, when considered in connection with others. But the statement bears truth in the implication that the soldier's liability to his fellow-citizen is for the common law, and it only, to define.

Nor is it merely the fellow-citizen of the soldier who might have a complaint against him cognizable in the civil courts. The protection of the common law was never limited to questions of citizenship; its original test was merely whether the plaintiff was within the King's peace.[5] Hence the alien too may have his rights, enforceable in the common law courts.

But when we speak of the alien's rights against the soldier, we reach the borderline of the common law, because certain classes of aliens are excluded from complaint, in common law courts, of harm done them. Such is the case of the alien enemy in arms, and such is the case of the alien enemy non-combatant against whom a soldier's tort has been ratified by our government. Here the common law stops short of questions of State. Such questions "are generally political rather than legal in their nature," belonging, says the Supreme Court "more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it."[6] But that does not

[5] See Ames, Lectures on Legal History, 56.

[6] U. S. *v.* Palmer, 3 Wheat. 610. Thus the public acts of foreign governments, in matters of international relations, are proven by the records of our

mean that civil courts are excluded from all questions which savor of the international. As has been well said: "The rules of international law have not infrequently become the subject of inquiry by courts in order to determine the rights of litigants, in which case, of course, the rules of international law are ascertained and applied by the courts in the same way as rules of private law, and international law thus has to that extent a complete and formal sanction. Our own Federal courts, for example, have been called upon at various times to interpret treaties, to determine in a given case whether a state of war existed, whether a blockade existed, what was lawful prize and contraband, the rights of neutrals and belligerents, and many other questions of purely international law."[7] From this we can gather that the boundaries of the common law courts are not a matter of angles and squares; yet the courts must respect these boundaries, and they are important factors in any consideration of the army's place in our law.

Such then is our task, to define the army's relation to the common law. The naval establishment occupies a position equal to that of the army as a part of our national defense, and many of the principles hereinafter discussed apply to it as well—in fact all the fundamental principles do—but clarity of presentation will be best preserved, it is believed, by confining this discussion to the army.

State Department rather than by independent judicial inquiry. Taylor *v.* Barclay, 2 Sim. 213; Underhill *v.* Hernandez, 168 U. S. 250; Mighell *v.* Sultan of Johore (1894) 1 Q. B. 149.

[7] Stone, Law and its Administration, 84–85.

II

THE CONSTITUTION OF THE ARMY

Prior to the outbreak of the present war, we had two organizations, one being the United States Army, commonly called the regular army, and the other the State Militia or National Guard. The President is always the commander-in-chief of the army, and he is also the supreme head of the national guard "when called into the actual service of the United States."[1] In matters of command he acts through the War Department, at whose head is a cabinet officer, the Secretary of War. Beneath him come successive ranks of command extending from the Chief of Staff down through the various grades of commissioned officers. Between the commissioned officers and the private soldier are met, in order of authority, the two classes of non-commissioned officers, sergeants and corporals. This body, thus directed by the Executive through the Secretary of War, constitutes the Army of the United States.

Congress has power to provide for the creation of the army, "but no appropriation to that effect shall be for more than two years."[2] The militia belong to the several States, but the Constitution gives Congress power to bring them into the army in time of war, and to make laws for organizing, arming and disciplining them when occupying such a status.[3] According to our national

[1] Constitution, Art. II, Sect. 2.
[2] Constitution, Art. I, Sect. 8.
[3] Constitution, Art. I, Sect. 8.

scheme, "power to declare war is confided to Congress. The executive power, and the command of the military and naval forces, is vested in the President."[4]

In time of peace the national government has at its service only the national forces as distinct from State militia, which may be merged into the national forces only in time of war. Within its restricted orb of action each State uses its militia for the same purposes of self protection as the national government uses the army, and the common law's views with regard to such a State force coincide with its views with regard to the national army. It is not necessary, therefore, for us to concern ourselves with the functions of the State militia when existing, as a separate body, in time of peace; and in time of war, as we have seen, the militia is at the disposition of Congress.

Our constitutional theories prohibit the use of the national army for any purpose not distinctly Federal. It, of course, may be used in time of war; and it may be used in any case where the maintenance of the Federal Government's power is in question, or where some duty is charged upon the Federal Government for the discharge of which the use of the army is necessary. National legislation on this subject all bears to that end.[5] In general outline, the use of the army, in connection with the functions of the national government, is governed by substantially the same considerations as control the use of the British army in similar connections. There is, however, with us one restriction which must be noted, that the army shall not be used "as a posse

[4] Hamilton *v.* Dillon, 21 Wall. 73.

[5] See enumeration in Davis, Mil. Law, 3d ed., p. 34, *et seq.*

comitatus or otherwise," for the purpose of executing the laws, except in such cases and under such circumstances as its employment may be expressly authorized by the Constitution or by act of Congress.[6] These restrictions, however, in view of legislation on the subject come down to about this, that a United States marshal cannot call out any portion of the army for the mere purpose of executing a writ in a criminal or civil proceeding, in the same manner as he may by common law call out the body of the citizenry in his district.[7]

Let us now turn to the personnel of the army. First, there are the commissioned officers, ranging in rank from the second lieutenant up through the various ranks of general. A commission is not a contract of any sort; but removal is regulated by the Articles of War and regulations hereinafter discussed, which provide for such a thing only in case of conviction of a military offense by a court martial or on the advice of a special board. An officer in the new national army created by the Selective Service Act of May 18, 1917,[8] however, has not even that vested right, for Section 9 of that statute allows his removal by the President, in the latter's discretion. Then come the non-commissioned officers, appointed from among the ranks of the private soldiers. So the manner and form of one's joining the ranks as an enlisted man will be our next inquiry.

Prior to our entry into the present war, an essential quality of both the regular army and the national guard was that no man need elect to serve in either except by

[6] Act June 12, 1878, Sect. 15, 20 Stat. 152.

[7] See on this whole subject Davis, *op. cit.* c. XVIII.

[8] 40 Stat. 76.

his own choice. To leave out of the question the national guard, this made our regular army a "standing army" of the kind with which English history has made us so familiar since the days of the Stuarts. In its support, outside of the reserve corps created by recent legislation, there stood nothing but the State militia. This system, whose utter inadequacy has been faithfully shown by competent critics on both sides of the Atlantic,[9] has been a characteristic of Anglo-Saxon institutions for three centuries. In England, at least prior to the Territorial and Reserve Forces Act of 1907, there were the regular army and the militia, and the statute just mentioned did not repeal the various militia acts which go back to the time of Charles II.[10] "Historically," says a standard writer, "the militia is an older institution than the permanent army, and the existence of a standing army is historically, and according to constitutional theories, an anomaly. Hence the standing army has often been treated by writers of authority as a sort of exceptional or subordinate topic, a kind of excrescence, so to speak, on the national and constitutional force known as the militia. As a matter of fact, of course, the standing army is now the real national force, and the territorial force is a body of secondary importance."[11]

The same thing happened with us. Taking over the English fear of the standing army, our Constitution adopted the English conception of the annual mutiny act, of which more will be said hereafter, by providing

[9] See Upton's "Military Policy of the United States."
[10] Dicey, Law of the Constitution, 8th ed. 291.
[11] Dicey, Law of the Constitution, 8th ed. 292.

that no appropriation for the support of the army shall be for a longer period than two years. At the same time we are told that "a well-regulated militia is essential for the security of a free people." General Upton, in his "Military Policy of the United States," has shown that, whatever may be the value of militia as against an overweening sovereign, its essential worth as security for a free people against a foreign invader is a very doubtful quality, because, to speak only of our war of 1812, a small force of regulars defeated a much larger force of militia at Bladensburg, took Washington and burned the Capitol. It is also noteworthy that two satires on militia training, so alike as to have raised the charge of plagiarism, are to be found in Longstreet's "Georgia Scenes," published long before our Civil War, and Thomas Hardy's "Trumpet Major," published in our own time.

Over against this theory of a small standing army and the militia, stands the idea of universal service, an idea to the acceptance of which the exigencies of the present war have forced both England and this country. But as, at least with us, our scheme of universal service is limited, by the terms of the Selective Service Act of May 18, 1917, to the period of the war, it might not be out of place to point out certain historical considerations. These are so obvious, and concerning them so much has been said, that the only claim for their presentation is the fact that the end of a great war always brings problems, and that among the greatest of these will be the question whether we shall return to the complex army-militia system of olden time.

We hear much of universal service as a German idea. May we point to the fact that, as a practical matter, it originated (as opposed to the idea of standing armies), with the French Republic at its birth? On February 21, 1793, France, having relied during the previous year on volunteers, now England and Holland joining the ranks of her enemies, enacted, through the decree of the National Convention as follows:

"Tous les citoyens français, depuis l'âge de 18 ans jusqu'à 40 ans accomplis, non mariés ou veufs sans enfants sont en état de réquisition permanente jusqu'à l'époque du complément du recrutement effective des 300,000 hommes de nouvelle leveé, décréteé ci-après."[12]

Thus originated, in the words of one of France's soldierly enemies, "the conscription, that mighty staff on which France leaned when all Europe attempted to push her down—the conscription, without which she could never have sustained the dreadful war of antagonist principles entailed upon her by the revolution —that energetic law which he (Napoleon) did not establish, but which he freed from abuse and rendered great, rational and endurable, by causing it to strike equally on all classes: the conscription made the soldiers the real representatives of the people."[13] It is a commonplace how Prussia, in the bitter years that followed Jena, elaborated the proposition of universal service, and how France, in the epoch that lay between Waterloo and Sedan, departed more and more from its rigid enforcement; but the basic idea of the enrolment of a nation's manhood in her defense is essentialy French.

[12] Caron, La Défense Nationale, 8.

[13] Napier, Peninsular War, Bk. 22, c. 4.

Prior to this titanic stroke of the beleaguered French Republic, the idea of a standing army had been very fashionable on the continent of Europe, attaining, indeed, its full flower about the middle of the eighteenth century. The philosophical tendency at that time was to regard war as an affair of kings, not of the people, and the idea thus germinated was shared by minds the most diverse. Thus both Rousseau and his Dutch contemporary, Vattel, advanced the suggestion that war is merely a relation of State to State, in which the individual citizens have no interest, except as they may be hired soldiers.[14] To the same view came finally Frederick the Great, despite the fact that a crude theory of universal service, in the shape of allotted districts for recruiting purposes, had existed in Prussia even in his father's time. "The old King saw with satisfaction," says the admiring Treitschke, "how his unfortunate land was being strengthened agriculturally, and now defined the ideal of the army with the astounding words, 'The peaceful citizen shall not even notice when the nation is at war'. So one of the pillars which upheld the edifice of State—universal service—began slowly to totter."[15] A little earlier in the century an incident of the kind Frederick fondly prefigured had actually occurred. A peaceful citizen of England, the Rev. Lawrence Sterne, tells us how he got as far on his "Sentimental Journey" as Paris, in sheer forgetfulness that his nation was then at war with France. And, finally, if we want the very pitch and climax of this idea—the peaceful citizen going about his business in comfortable calm, while his coun-

[14] See passages quoted in Bordwell, Law of War, 47.

[15] Treitschke, Life of Frederick the Great, Putnam ed., 183–184.

try's sovereign and standing army hold off the foe—let us read what Paley, whose part in contemporary English and American thought has been recognized by many writers of much diversity of opinion has to say on the subject. His Moral Philosophy contains a chapter [16] treating "Of War and of Military Establishments." After pointing out that it is not unlawful for a Christian to bear arms, and that a nation should go to war if just cause compels it (with which we all agree), he proceeds to discuss the system of a standing army. Showing first the inefficacy of militia as against a standing army, with which we must agree if we read General Upton's book, he concludes that the standing army is the only thing to have. That, in the face of the examples afforded, first by the campaigns of revolutionary and Napoleonic France, and later of Prussia in 1866 and 1870, is a *non sequitur*, because most assuredly, as against a nation with a system of universal service, a small standing army, however excellent, cannot prevail.

But this conclusion of Dr. Paley's is not as interesting as his additional reflections on the subject. In them lies imbedded an historical fact of great value, namely, that at one time, and not so very far back in our common history, the idea of universal service was accepted; the only difference being that this idea was then applied to the militia. From the terms of the English statute regulating the militia, enacted in 1663 [17] Professor Dicey draws the conclusion that "in the Seventeenth Century Parliament apparently meant to rely, for the defense of England, upon this national army raised from the coun-

[16] Bk. 6, c. 12.

[17] 14 Car. II, c. 3.

ties and placed under the guidance of country gentlemen."[18] It was the standing army, composed partly of foreign mercenaries, and devoted to the service of the King, of which Parliament was jealous, not the national army proposed by the Act of 1663.[19] The standing army, in short, was part of that royal appanage of which Parliament was distrustful. Therefore, after the revolution of 1688, Parliament adopted the expedient of an annual Mutiny Act, which made offenses against discipline in the regular army punishable by court martial, only for the period of one year; thus making it necessary for Parliament annually to provide for the continuance of a regular army. But an astonishing change came with the successful operations of the new army, in the campaigns of Marlborough; a change which Addison reflects in the 165th essay of the Spectator. The standing army then became popular with the middle and upper classes, and those who expressed their philosophy of life, among whom was Dr. Paley. So, to return to Dr. Paley's observations of war and the military establishment, we find him saying this:

Moreover, as such a militia must be supplied by rotation, allotment, or some mode of succession whereby they who have served a certain time are replaced by fresh draughts from the country, a much greater number will be instructed in the use of arms, and will have been occasionally embodied

[18] Dicey, *op. cit.* 293 n.

[19] See Federalist, pts. 24–26. Thus during the Protectorate the case of Paradine *v.* Jane, Aleyn 26, the pioneer case on the operation of war as *vis major* in excusing non-performance of contract, was decided. The defendant, the owner of lands over which Prince Rupert's army had passed, described in his plea the Prince as "a certain German Prince, by name Prince Rupert, an alien born, enemy to the King and his Kingdom, who did invade this realm with a hostile body of men."

together, than are actually employed, or than are supposed to be wanted, at the same time. Now, what effects upon the civil condition of the country may be looked for from this general diffusion of the military character, becomes an inquiry of great importance and delicacy. To me it appears doubtful whether any government can be long secure, where the people are accustomed to the use of arms and accustomed to resort to them. . . To which we may subjoin that in governments like ours, if the direction and officering of the army were placed in the hands of the democratic part of the constitution, this power, added to what they already possess, would so over-balance all that would be left of regal prerogative that little would remain of monarchy in the constitution, but the name and expense, nor would these probably remain long.[20]

Now, there is a complete Tory argument against universal service, so complete as to leave no doubt in the mind of any democrat of the wisdom of a system of universal service; for, so far from its being incompatible with a democratic state, Dr. Paley, the spokesman of the eighteenth century High Tories, shows that it is an abhorrent thing, and wholly incompatible with the system of government of which George III was a shining exemplar. The fathers of our Constitution grasped a part of that idea, when they put the provisions of the Mutiny Act into our Constitution, but, like our English ancestors of the Whig school, they never thought of wiping out the dual system of standing army plus militia, and establishing in its place a single national army based on universal service, in which only the corps of officers should have permanency. The democratic

[20] Paley, Moral Philosophy, Bk. 6, c. 12. To somewhat the same effect writes another eighteenth century philosopher, but of a far more liberal complexion, Adam Smith, Wealth of Nations, Bk. 6, c. 1.

statesmen of modern English times have followed the same line, keeping the dual system of a small standing army with a nebulous militia. Both nations, therefore, long ignored the fact that the idea of universal service had germinated in England, and burgeoned in France, as already shown. Perhaps at the conclusion of this war there will still be found people in English-speaking countries who will maintain that the idea of universal service belongs wholly to Prussia, blinding their eyes to the fact that its genesis comes from far more liberal sources.

But whatever decision may be reached after the war as to our military system, it is enough for our present purposes to deal with that which we have. Our Selective Service Law of May 18, 1917, retained the regular army, authorizing its increase to 287,000 men, and retained the national guard, authorizing its increase to 625,000 men. But it provides in order to (*a*) fill vacancies in the regular army and national guard, and (*b*) raise a new national army, for the registration of "all male persons between the ages of twenty-one and thirty, both inclusive." Previous legislation of 1914–1916 had provided for drafting the national guard into the federal service, and, prior to the passage of the Act of May 18, 1917, some had already been so drafted. With the passage of the latter Act the President issued orders for drafting the entire national guard into the federal service, and his proclamation dated May 18, 1917, fixed June 5, 1917, as Registration Day under the new statute.[21] With the rest we are familiar, and it only remains to note with satisfaction that the constitution-

[21] 6 Times Current History, Pt. 1, 380.

ality of it all has been upheld by the Supreme Court.[22] So we are now at war, with the man-power of the nation as our weapon, just as France in 1793 sent forth her conscripts to fields whose names are household words in history.

Let us remember, finally, that the idea of conscription for service should not be such a strange thing to us as it might be to the English. This is the first time, since the Civil War of Charles I, that England has suffered any devastation from war. In the time of our Civil War this country, in both sections, knew what it meant to have the enemy at the gates. And previously, in the war of 1812 an armed enemy took a part of our domain in the far North,[23] resulting in the British occupation of Castine, another force won on our soil the battle of Bladensburg and captured Washington, and still another landed in Louisiana and retired only after the battle of New Orleans.

It is no wonder that as far back as 1841 Mr. Monroe, Secretary of War, advocated compulsory service.[24] In our Civil War both sides resorted to conscription. The Confederate Congress, by its Acts of April 16, 1862, and September 27, 1862, authorized the Confederate President "to call out and to place in the military service of the Confederate States, for three years, unless the war shall have sooner ended, all white men, who are resident in the Confederate States" between certain ages, who were not legally exempt from military service.[25] The constitutionality of this legislation was upheld in such

[22] Arver *v.* U. S., 245 U. S. 366; 38 Sup. Ct. Rep. 159.

[23] See U. S. *v.* Rice, 4 Wheat. 246.

[24] See citations in Jeffers *v.* Fair, 33 Ga. 347, and Arver *v.* U. S., *supra*.

[25] Jeffers *v.* Fair, *supra*.

courts of the Confederate States as it came before, and particularly is to be commended the decision of the Supreme Court of Georgia.[26] The United States government was authorized by Congress to take men selected by a system of lottery or draft, for military purposes, by the Act of March 3, 1863.[27] The constitutionality of this Act unfortunately was not tested in the Supreme Court, but it is noteworthy that that court, in deciding the constitutionality of the present Act, places part of its reliance on the decisions of the State courts which, sitting within the Confederacy, upheld the Conscription Acts of the Confederate States.[28]

The historical and constitutional matters which have already been considered, long ago induced our courts, in common with those of England, to view the army as having a distinct status in the governmental system, indeed as occupying the position practically of an estate of the realm. The cardinal necessities of its existence, command on the one side and obedience on the other, can lead to no other conclusion on the part of a common law court, if it is to recognize the lawfulness of having an army at all. Matters connected with the army are, therefore, in the common law view, essentially things of status rather than contract. This is not the only instance of common law acceptance of status as an actual proposition. Marriage, for example, with its accompanying restrictions in points of evidence and of property right, is, in our law, wholly a matter of status.

[26] Jeffers *v.* Fair, *supra*. For a defense of the Confederate statute against the attacks of Governor Brown of Georgia, see Davis, Rise and Fall of the Confederate Government, Vol. I, 506.

[27] 12 Stat. 731.

[28] Arver *v.* U. S., 245 U. S. 366; 38 Sup. Ct. Rep. 159.

Just so it is with the army, and, therefore, we find the law fully admitting that entry into the national service effects, for the soldier or officer concerned, a "change of status."[29]

The Selective Service Act of May 18, 1917, can make no difference in this respect, because no valid distinction can be seen in whether one's status is assumed voluntarily or imposed upon one by operation of law. In the words of the Supreme Court, which has fully upheld the statute, compulsory service simply amounts to "the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation," and any contention that this imposes involuntary servitude is refuted by its mere statement.[30]

For that reason, a minor's enlistment, so far as the common law was concerned, was not voidable, even from his standpoint or that of his parents, nor was it voidable so far as the State was concerned so long as the minor was capable of bearing arms.[31] In the words of Best, J., the general policy of the common law requires "that a minor shall be at liberty to contract an engagement to serve the State."[32] For any such modification of this broad view as may obtain at present, therefore, we must look to statutes, and ours on the subject are very simple.

Prior to 1899 our statute [33] had fixed the enlistment age as between sixteen and thirty-five. The Act of

[29] *Re* Morrissey, 137 U. S. 157; 11 Sup. Ct. Rep. 54.

[30] Arver *v.* U. S., 245 U. S. 366, 38 Sup. Ct. Rep. 159.

[31] *Re* Grimley, 137 U. S. 147; 11 Sup. Ct. Rep. 54; *Re* Morrissey 137 U. S. 157; 11 Sup. Ct. Rep. 57; U. S. Manual for Courts Martial 393.

[32] Rex *v.* Rotherfield Grays, 1 B. & C. 345.

[33] R. S., Sect. 1116.

March 2, 1899 [34], as re-enacted by the National Defense Act of June 3, 1916 [35], raised the minimum age to eighteen, and provided that if a minor applicant had a parent or guardian entitled to his custody and control, he should not be enlisted or mustered into the service without the written consent of such parent or guardian. Under this scheme it would follow that the enlistment of a minor having parent or guardian, without the latter's consent, could be effected only by his making to the recruiting officer untruthful statements as to his age, or presenting a false certificate as to the consent of his parent or guardian. In any such case, the only one logically entitled to complain would be the parent or guardian thus defrauded, by the minor's act, of his services. Certainly the minor, the perpetrator of the fraud, should not be allowed to complain. Such is the view of the courts. They considered this statute as intended, not for the minor's protection, but rather for the benefit of the parent or guardian. The enlistment, of its own force, made the minor "not only *de facto*, but *de jure* a soldier—amenable to military discipline."[36] And then it must be remembered that there is another innocent party in the transaction, the government; and the courts felt that they could not allow the statutory right of the parent or guardian to operate to the prejudice of the government. Hence the demand of the parent or guardian for the return of the minor should be promptly made, and any delay will be construed as a consent, operating by way of an estoppel on

[34] 30 Stat. 978.
[35] 39 Stat. 186, Sect. 27.
[36] *Re* Morrissey (*supra*).

the demandant.[37] Also it is just as clear that the avoidance of the enlistment must await, for its operation, the consequences of any military offense which the minor may have committed with, or after, his enlistment. All of this, when coupled with the statute enacted in 1892,[38] whose provisions now form part of the Articles of War,[39] makes fraudulent enlistment and the receipt of pay or allowances thereunder a military offense. The result is that the minor's very act of deception in enlisting, if followed by the receipt of a dollar of pay, is an offense for which the government may exact punishment, prior to his being handed over to the parent or guardian.[40]

The same propositions apply to other matters of disqualification. The statutes[41] reject as applicants aliens,

[37] *Ex parte* Dunakin, 202 Fed. 290; *Ex parte* Dostal, 243 Fed. 664. "It is settled law that a minor, who enlists without the written consent of a parent or guardian, when such consent is required, becomes a soldier. His enlistment is not void, nor is it voidable in any event by him. He may be released from the service by a timely application of the parent or guardian having a superior right to his custody or control. But this application must be made with reasonable diligence, after the parent or guardian has acquired knowledge of the actual enlistment, and before an offense has been committed by him. After an offense has been committed by the minor against the military law, and especially after he has been placed under arrest and charges have been preferred against him, it is too late for the parent or guardian to oust the jurisdiction of the military authorities by an application to the civil courts for a writ of habeas corpus. See the following: *Ex parte* Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; *In re* Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644; *Ex parte* Hubbard (C. C.) 182 Fed. 76; *Ex parte* Dunakin (D. C.) 202 Fed. 290; Dillingham *v.* Booker, 163 Fed. 696, 90 C. C. A. 280, 18 L. R. A. (N. S.) 956, 16 Ann. Cas. 127; U. S. *v.* Williford 220 Fed. 291, 163 C. C. A. 273; McGorray *v.* Murphy, 80 Ohio St. 413, 88 N. E. 881, 17 Ann. Cas. 444." *Ex parte* Dostal, *supra.*

[38] Act July 27, 1892, 27 Stat. 278.

[39] Art. 54, as revised by Act of Aug. 29, 1916, 39 Stat. 650.

[40] U. S. *v.* Williford, 220 Fed. 291, and cases there cited; Manual of Courts Martial 393–396.

[41] R. S., Sect. 1118 and following, now sections 27 and following of National Defense Act of June 3, 1916, 39 Stat. 186.

insane and intoxicated persons, and deserters. The case of one *non compos mentis*, such as an insane or intoxicated person, takes care of itself, because his mind did not accompany his act and he did not make a change of status. But if the government should be satisfied to keep in its service an alien or deserter, again the common law idea of status prevails over the statutory definition, and the soldier cannot escape by showing that his enlistment should not have been accepted.[42]

[42] *Ex parte* Dostal, *supra*, and cases there cited. The whole proposition is stated in the following language of Brewer, J., *In re* Grimley, *supra:* "Grimley has made an untrue statement in regard to his qualifications. The Government makes no objection because of the untruth. The qualification is one for the benefit of the Government, one of the contracting parties. Who can take advantage of Grimley's lack of qualification? Obviously only the party for whose benefit it was inserted. Such is the ordinary law of contracts. Suppose *A*, an individual, were to offer to enter into contract with persons of Anglo-Saxon descent, and *B*, representing that he is of such descent, accepts the offer and enters into contract; can he, thereafter, *A* making no objection, repudiate the contract on the ground that he is not of Anglo-Saxon descent? *A* has prescribed the terms. He contracts with *B* upon the strength of his representations that he comes within those terms. Can *B* thereafter plead his disability in avoidance of the contract? On the other hand, suppose for any reason it could be contended that the proviso as to age was for the benefit of the party enlisting, is Grimley in any better position? The matter of age is merely incidental, and not of the substance of the contract; and can a party by false representations as to such incidental matter obtain a contract, and thereafter disown and repudiate its obligations on the simple ground that the fact in reference to this incidental matter was contrary to his representations? . . He cannot, of his own volition, throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into the new relations with him, or permitted him to change his status. . . . A naturalized citizen would not be permitted, as a defense to a charge of treason, to say that he had acquired his citizenship through perjury, that he had not been a resident of the United States for five years, or within the State or Territory where he was naturalized one year, or that he was not a man of good moral character, or that he was not attached to the Constitution. No more can an enlisted soldier avoid a charge of desertion, and escape the consequences of such act, by proof that he was over age at the time of enlistment, or that he was not able bodied, or that he had been

So stood the law prior to our entry into the War. Some important differences have been made by the Selective Service Law of May 18, 1917

First of all, this statute finds, with its enactment, the two volunteer organizations, the Regular Army and the National Guard. The former it continues; the latter it authorizes the President to draft into the service of the national government. This, as to the members of the National Guard, effects a change of status. The President's proclamation makes each such man a member of the national military forces from the time the call is issued, so that a refusal to obey it is a military offense against the national authority, and punishable as such. It is true that, when a similar draft was made in 1812, the Supreme Court at first considered that the Act of Congress made the officers and members of the militia a part of the national forces only from the time of their arrival at the appointed place of mobilization, whereas

convicted of a felony, or that before his enlistment he had been a deserter from the military service of the United States. These are matters which do not inhere in the substance of the contract, do not prevent a change of status, do not render the new relations assumed absolutely void." (*In re* Grimley, *supra*). So far as questions of allegiance may go, an alien enlisted man need find no difficulty: "This section provides that no person who is not a citizen of the United States, or who has not made a legal declaration of his intention to become a citizen, shall in time of peace be enlisted for the first enlistment of the army. It will be noted that this limitation applies only in times of peace; if the United States is at war, the limitation does not apply." *Ex parte* Dostal, 243 Fed. 664, 673.

". . . for though, by such a stipulation, he may by possibility involve himself in difficulties in regard to his allegiance to his native sovereign, that is a matter for his own consideration, and cannot affect the validity of his new obligation. If any authority were necessary for so self-evident a proposition, it would be found, not only in the practice of employing foreign mercenaries, which has prevailed amongst civilized nations in all ages, but in the doctrine as laid down by the most approved writers, Vattel, b. 1, c. 19, Sect. 213; 1 Bl. Com. 370." U. S. *v.* Cottingham, 1 Rob. Va. 615, quoted in *Ex parte* Dostal, *supra*.

Story, J., thought that the status was imposed from the date when the soldier received notice of the call. But in the end this made no difference, because all the Judges agreed that it was competent to make the date of the call the time when the officers and members of the militia became subject to the military control of the Government.[43] If any subtle shade of distinction in this respect had remained, it was obliterated in the later decision of Martin *v.* Mott.[44] There a general court martial [45] imposed a fine on the plaintiff because he, being a member of the New York national guard, neglected to obey the call. The defendant, a United States marshal, levied on the plaintiff's goods to satisfy the fine, whereupon the plaintiff brought replevin against the marshal. The New York Court of Errors decided for the plaintiff,[46] but the Supreme Court, on writ of error, reversed the decision. The draft had been imposed under the Act of Congress of February 28, 1795, c. 101, which authorized the President to draft the militia whenever a national exigency required it. The result of the Supreme Court's decision was to remove any thought that the jurisdiction attached only after the militiaman had reported for duty at the place of assembly. In the Civil War, indeed, Congress, to remove any doubt on the subject, provided, by its Act[47] drafting the militia into the national forces, that anyone failing to report should be deemed a deserter, subject to trial by court martial of the national army. A recusant

[43] Houston *v.* Moore, 5 Wheat. 1.
[44] 12 Wheat. 19.
[45] Sitting under the Act of February 28, 1795, c. 101.
[46] Mills *v.* Martin, 19 Johns. 7.
[47] July 17, 1862, 12 Stat. 601.

of this class was held to be a drafted soldier from the date of the draft order, and hence his failure to report made his offense desertion from the national army.[48] The same result has been reached under the present law.[49]

[48] *In re* McCall, Fed. Cas. 8669.
[49] *Ex parte* Dostal, *supra.*

III

MILITARY LAW AND MILITARY COURTS

Just as today the lawyer interested in any branch of practice finds part of his law in the shape of code and part still in the flux of case law, so military law—using that term in its broadest sense—presents itself today partly by way of code and partly by way of tradition and precedent. The codified part in turn divides itself into those portions which, though codified, have not passed into the shape of statutes, and those parts which have, by statutory enactment, become written law of the land.

With us the statutory portion is expressed in our Articles of War. The Constitution [1] allows Congress to "make rules for the government and regulation of the land and naval forces." The Articles of War governing our army were first prepared at the outbreak of our Revolutionary War,[2] attained statutory recognition after the adoption of the Constitution,[3] and received a legislative overhauling in 1806. The Act of April 10, 1806,[4] constituted, with amendments made from time to time, a complete statutory code of laws governing the relations of officers and men, and their conduct as affecting the good of the service, until 1916, when the

[1] Art. I, Sect. 8, 14.
[2] Davis, Mil. Law, 3d ed., 342.
[3] Act September 29, 1789, 1 Stat. 95.
[4] 2 Stat. 359; Comp. Stat. 1913, Sects. 2305–2448.

Act of August 29th of that year[5] recodified the original articles, together with intervening amendments, in the present Military Code.

This Code applies only to those who can be considered part of the army's personnel, including army field clerks and field clerks of the Quartermaster's Corps, so far as the army at home and in time of peace is concerned. When the Army is abroad, without the territorial jurisdiction of the United States, the Articles apply as well to all camp retainers and persons serving with the army, and also persons accompanying it—this last class, obviously intended to cover war correspondents, being added in 1916; and in time of war all such persons are subject to the Articles, whether the army is within or without the country.[6]

Historically these statutes find their source in the corresponding British Articles [7] and the latter go back in turn to the Revolution of 1688. The English Mutiny Act, which was mentioned in the last chapter, is a commonplace of constitutional history. The device of an annual Mutiny Act, adopted in the time of William III [8] as a result of the Revolution of 1688, had for its object to deprive the Crown of an army for more than a year at a time. To accomplish this the Act, annually passed, provides two things: first, an appropriation, for the army's support, for only one year, and second, authority to define offenses against discipline

[5] 39 Stat. 650.

[6] In time of war, "accompanying" is given a very broad meaning, covering all cases of one being present with the commander's permission. See *Ex parte* Gerlach, 247 Fed. 616.

[7] Davis, Mil. Law, 3d ed. 342.

[8] The first Act was enacted April 3, 1689, 1 W. & M., c. 5.

and punish them through courts martial, also for only one year. Thus, at the end of each year, not merely will the army be without pay unless the Act be renewed, but it will also be without any lawful rules of discipline, much less the means of enforcing breaches of discipline. "If this Act were not in force a soldier would not be bound by military law. Desertion would be at most only a breach of contract, and striking an officer would be no more than an assault."[9]

This statute, however, did not contain in itself a complete code of regulations. While it made mutiny and desertion punishable by court martial, it left all other matters affecting discipline to be regulated by the royal prerogative, and, therefore, indeed, sanctioned such regulations as had previously existed for the government of the British forces. We thus are led back historically to the Articles of War which had been issued two years previously, and whose origin in turn may be found in various regulations drawn up for the conduct and discipline of the army, notably in which may be placed the Prince Rupert Articles of 1672.[10] These Articles, therefore, says the writer last cited, "though frequently added to and amended, or modified, by the issue of subsequent articles, continued in force, side by side with the Mutiny Act, and in subordination to that instrument, until 1879, when the Mutiny Act and Articles of War were merged in an enactment known as the Army Discipline Act, which, as re-enacted in the Army Act of 1881, is still in force throughout the British Empire."[11]

[9] Dicey, Law of the Constitution, 8th ed., p. 305.
[10] See Davis, *op. cit.* 3, Appendix A.
[11] Davis, *op. cit.* 3.

The double aspect of the English statute, consisting in its appropriating money for the army's support for only one year, and also conferring authority to punish offenses against discipline, though recognized by all having occasion to examine the subject,[12] was overlooked by the framers of our Constitution. They provided that no sums should be voted for the support of the army for a longer period than two years, but they did not provide a time limit for statutory provisions concerning the discipline of the army. Therefore, the Act of 1806 [13] and its amendments, now recodified by the Act of 1916,[14] constitute that permanent statutory code which the British Army, in theory, lacks. But there is no practical difference in the fundamentals of the two establishments, because, despite the permanence of our military code, as a practical matter there would be no army for its governance unless Congress, every two years, should appropriate the funds necessary for that purpose.

As these Articles apply only to persons who may be considered parts of the military machine, so most of the offenses they prescribe are offenses which only such persons would have the faculty of committing. There is, however, one exception. In time of war the Articles extend to the case of a spy, as therein defined, whether or not the accused person wear our uniform, or be entitled to wear it, or be a citizen or alien. A most wholesome Article, as it stands today [15] provides that

[12] See, for example, dissenting opinion of Woodbury, J., in Luther *v.* Borden (7 How. 1).

[13] *Supra.*

[14] *Supra.*

[15] Art. 82.

"any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court martial or by a military commission, and shall, on conviction thereof, suffer death." Of this Article more will be said hereafter. It is marked now as an exception to the proposition that the Articles of War apply only to persons who, as therein defined, compose the army's personnel, and have no relation to persons who have not assumed the status of soldier, or assumed some other connection with the army as above defined.

Outside of the one provision applying to a spy, we need go no further for a classification of these Articles than the statute itself. The first two are articles of definition, then we have a number of articles relating to the composition and procedure of courts martial [16] and of inquiry,[17] and then come the punitive articles. These last a recent official book [18] has divided according to the following headings, which speak for themselves: First: *Enlistment, Muster. Return.* Second: *Desertion. Absence without leave.* Third: *Disrespect. Insubordination. Mutiny.* Fourth: *Arrest. Confinement.* Fifth: *War offenses.* Sixth: *Miscellaneous crimes and offenses.*

In addition to the Articles of War we find the army regulations. These stand in point of authority next to the formal enactments of Congress and the decisions of courts, but, like any other departmental regulations

[16] Arts. 3–53.

[17] Arts. 97–103, 111, 113–116.

[18] U. S. Man. for Courts Martial, 1917, p. 193, *et seq.*

they cannot, for their validity, conflict with these higher laws.[19] They are, in short, merely executive or administrative rules. In the same category may be placed general orders issued from time to time from any grade of command, although, of course, they relate more to matters of administration than to rules of conduct.

In time of war there is a certain amount of additional code law governing the army in its relations with the enemy, both armed and non-combatant. Outside of the scanty enactments afforded by the Declaration of Paris, the first code of the laws governing the conduct of an army in the field emanated from this country in the stress of the Civil War. That war will be remembered, among other things which have placed it on the pages of history, "for the issuance of the instructions for the government of the armies of the United States in the field, prepared by Dr. Francis Lieber and revised by a number of officers of the United States Army."[20] These instructions constituted, to use the language of the writer last quoted, the first comprehensive codification of the laws of war.[21] Published in 1863, by General Order No. 100 of the War Department, this code was made obligatory on the armies of the United States in their operations against the South, and was so recognized by the United States Supreme Court.[22] It was republished at the time of our Spanish War. No general order in the course of the present war has as yet included the code, but its principles, nevertheless, are of force, with such amendments only as have been made

[19] Davis, *op. cit.* 6–7.
[20] Bordwell, Law of War, 73.
[21] Bordwell, Law of War, 74.
[22] *Ex parte* Vallandigham, 1 Wall. 243.

by our government's acceptance of international conventions.[23]

It is of interest to note in this connection that great as was the Justinian Code, it included, with respect to the military, provisions relating only to the governance of the army and matters of captured property.[24] Yet there always have been additional laws of war, for Grotius, in this respect, was more a pioneer of progress than a lawgiver of any sort. The reader need be neither of the profession of arms nor of the bar to find their mention. One has only to pick up Caesar's Commentaries to find Ariovistus, the German King, unctuously reminding the great Roman of certain of the customs of war then obtaining;[25] Montaigne's Essays are full of reflections upon the customs of war as they obtained in the days before Grotius wrote.[26] The regulations which Henry V promulgated for the guidance of the semi-feudal army which he took to the field of Agincourt and the resulting occupation of large portions of France, are still extant.[27] There has been growth in this body of jurisprudence of course, but it would be no true and healthy body did it not grow. From one point of view, one of our judges may be right when he says that "the rules introduced into modern warfare constitute so many voluntary relinquishments of the rights of war."[28] but, *mutatis mutandis*, the same may be said of growth in the common law. Still, no one attempted to

[23] See Appendix to Birkhimer, Military Government and Martial Law, for the present state of the Code with amendments.

[24] Bordwell, *op. cit.* 9–10. Sherman, Roman Law in the Modern World, §1025.

[25] Caesar, Gallic War, Book 1, c. 44.

[26] Particularly the Fifteenth Essay.

[27] Bordwell, Law of War, 86.

[28] *The Rapid*, 9 Cr. 154.

codify this law until 1863. Lieber's Code, therefore, however open to criticism though it may be in minor points, deserves all praise as a pioneer model, and as one of the best fruits of our Civil War.

Let us now turn to the uncodified portions of the law. Here, once and for all, let it be noted that the common law courts fully recognize the existence of what Mr. Justice Story called "the customary military law."[29] It is not for the writer to define or classify this body of law; as a common law practitioner he must remember the words of an English colonial judge [30] whose view has been adopted by our Supreme Court,[31] that "of questions not depending upon the construction of statutes, but upon military law or usage, within the jurisdiction of courts martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law." If even "common law judges have no opportunity, either from their law books or from the course of their experience, to inform themselves,"[32] it would be presumptuous for

[29] Martin *v.* Mott, 12 Wheat. 19.

[30] Perry, J., in Porret's Case, Perry's Oriental Cases, 414.

[31] Smith *v.* Whitney, 116 U. S. 167. To the same effect is Kirkman *v.* McClaughry, 160 Fed. 436, where the court, in upholding, on habeas corpus, the validity of a cumulative sentence inflicted by a court martial, said: "Doubtless, in actual practice, many common-law rules, deemed applicable to the proceedings of courts martial, have become incorporated into the customary military law, but nothing has been brought to our notice indicating that the rule relied upon by the appellant was deemed applicable to such proceedings in England, the home of the common law, or that it is recognized as a part of the customary military law of the United States. On the contrary, we learn from recognized sources of authority that, in the military service, it is a well-established and long-continued practice to regard sentences of courts martial, such as are here under consideration, as cumulative, and to execute them consecutively, one upon the expiration of another in the order of their imposition."

[32] Porret's Case, *supra.*

the writer to attempt a description of this actual body of law.[33] All he can do is to indicate its reaches.

Take, for instance, the procedure of courts martial. All matters not covered by the Articles of War are governed by the same things of tradition. We need give only two instances. Cumulative sentences are inflicted by courts martial, although no express authority may appear in the Articles of War.[34] An even more striking illustration is afforded by the wide range of precedent concerning the offense which is defined by the Articles of War [35] as conduct unbecoming an officer and a gentleman.[36] "The 92d Article of War, for example," says General Davis,[37] "does not prescribe by whom the oath shall be administered to witnesses before a court martial. By the custom of the service it is administered by the Judge Advocate. So, too, in a case where its sentence is discretionary, a court martial may impose any punishment that is sanctioned by the custom of the service, although (in the cases of enlisted men) the same may not be included in the list of the more usual punishments contained in the Manual for Courts Martial."

Another body of unwritten law includes crimes which, though not defined in the Articles, yet apply to

[33] It is, however, doubtless true, as stated by one of our courts "that many common law rules, deemed applicable to the proceedings of courts martial, have become incorporated into the customary military law," Kirkman *v.* McClaughry, 160 Fed. 436; and it is interesting to see how in this connection the Anglo-Saxon instinct for precedent has shown itself. One has only to read such a standard work as General Davis' Treatise on Military Law to note how, over and over, precedents are cited from actual decisions or opinions rendered by the judge advocate.

[34] Kirkman *v.* McClaughry, 160 Fed. 436.

[35] Art, 95.

[36] See Carter *v.* McClaughry, 183 U. S. 365, 22 Sup. Ct. Rep. 181.

[37] Davis, Mil. Law. 10.

the soldier in time of war. This branch of law is called in the government's publication [38] military law applied to the army, it being defined as "military power extending in time of war, insurrection or rebellion over persons in the military service, as to obligations arising out of such emergency and not falling within the domain of military law, nor otherwise regulated by law."

The Articles of War also allow (Art. 96) for punishment of "offenses prejudicial to the service though not mentioned in these Articles," and this again gives reference to the unwritten law and custom of the army.

Then we have a body of martial law which is applicable to the enemy, whether soldier or civilian; this distinct branch of law covering not merely the duties and obligations of prisoners of war, so far as the same may not be expressed in the written law comprised in Lieber's Code and the various international conventions, but also guiding our army in its government of occupied enemy country. And lastly we have what is called by many writers [39] martial law at home, or as a domestic fact; "by which is meant military power exercised in time of war, insurrection or rebellion in parts of the country retaining their allegiance, and over persons and goods not ordinarily subject to it."[40] The enforcement of all such law is committed to military courts, but the nature of these courts must vary according to the persons subject to them.

For the punishment of all offenses committed by persons comprising part of the military establishment as

[38] Man. for Courts Martial, 1917, p. 2.

[39] See Birkhimer, *op. cit.* and U.S. Govt. Man. for Courts Martial, 1917, p. 1.

[40] U. S. Govt. Man., p. 1.

defined by the Articles of War,—we have already noted the classifications of these offenses made by the Articles—the statutory code provides a system of courts whose personnel is drawn from the commissioned officers of the army. These courts are defined respectively by the Articles as general, special and summary courts martial.[41] A general court martial has power to try any person subject to the law applying to the army, for any crime or offense, as defined by either the written or unwritten law which we have mentioned above as applying to members of the forces.[42] A special court martial has power to try an offense committed by any person, except an officer, or other class excepted by the Executive, or a crime or offense not actually punishable by the Articles of War.[43] A summary court martial's jurisdiction is still more restricted by eliminating therefrom not merely officers, but cadets, soldiers holding the privilege of certificate or eligibility to promotion, and objecting non-commissioned officers.[44]

The procedure of these courts is prescribed by the Articles and the customs of war.[45] Needless to say its existence has but little of the flavor of the common law. These courts, as did all others whose origin lay without the domain of the common law, borrowed their forms of procedure from Roman sources. The practice of Roman courts of justice has never departed from the memories of men of the law. Its accents persist not merely in our courts of probate and of admiralty, but in the funda-

[41] Art. 3.
[42] Art. 12; U. S. Govt. Man. 21.
[43] Art. 13; U. S. Govt. Man. 21.
[44] Art. 14; U. S. Govt. Man. 22–23.
[45] See U. S. Govt. Man., p. 31, *et seq.* Davis, *op. cit.* 61 *et seq.*

mentals of equity practice;[46] and it is not strange that the procedure of courts martial faintly shadows the same mighty tradition. Indeed, in its early days the court martial, then presided over by the Earl Constable of England, was assisted by three doctors of the civil law.[47]

This, coupled with the fact that the jurisdiction of the court martial is essentially criminal, gives its procedure an added interest. The practice in equity is a daily reminder of the civil form of action by which the grievances of Roman citizens were redressed. But, outside of the practice in church courts, the procedure of the court martial is the only image, in any common law country, of the practice which prevailed in the criminal prosecutions of the days of the Empire. It is also interesting to note that the dual position of the judge advocate, the prosecutor in the military court, as not merely counsel for the government but also the adviser of the court, in the way of doing justice to the prisoner, is reflected by the modern office of district attorney or state prosecutor, an institution peculiar to this country. Finally, it is a matter of gratification to the common law practitioner that these courts endeavor to follow the rules of evidence recognized by the common law, and also to follow the common law in the definition of crimes, so far as such crimes may also be punishable by the Articles of War.[48]

[46] See Langdell Eq. Pl., p. 1, *et seq.*

[47] Sherman, *op. cit.* § 380; Davis *op cit.* 13.

[48] So far as matters of evidence are concerned, it is especially interesting to note that the chapter on evidence in the latest government manual (corrected to April 15, 1917) has had the benefit of the labors of Professor Wigmore, "recently constituted a major and judge advocate in the Officers' Reserve Corps." (See introduction to manual).

In peace or in war these courts pursue their functions, having jurisdiction over no citizens except those forming part of the military establishment, with the single exception, which has already been noted, of the case of a spy in time of war. That exception, indeed, so far as the one reported case which has been found indicates, is strictly construed by the common law courts, with the result that no such jurisdiction exists to try an alleged spy after the close of a war for an act done while the war was flagrant.[49]

Nothing of a civil nature attaches to the jurisdiction of these courts, they having no power to entertain a civil suit for the redress of any injury whatsoever. As long ago stated by Lawrence, J.,[50] "a court martial cannot give damages for injurious conduct as a jury can." If then, a member of the forces feels injured by the conduct of a person of the same rank or a superior, the only redress afforded him is to ask for the offices of another form of military court, the court of inquiry, which, after investigating the matter, can report its conclusions. If such conclusions demonstrate the commission of a military offense, the accused is then brought before a regular court martial for trial.[51] But in the end all such procedure gets back to the question of criminal prosecution, and thus the idea of reparation of wrong by damages or restitution is wholly excluded.

Another essential feature of the jurisdiction of such a court is that its judgment has merely an advisory effect, and no operation until it has received the ap-

[49] *Re* Martin, 45 Barb. 142.

[50] Warden *v.* Bailey, 4 Taunt. 66.

[51] For such procedure see Davis *op cit.* 223, *et seq.*

proval of that higher branch of the service through whose order of appointment the court martial received its fiat of creation.[52] After such a court has reported, it "ceases to exist" in the view of the English common law courts;[53] but if General Davis is right in his suggestion that a new trial, though rare, is yet possible,[54] then it may be questionable whether the existence of the court does not continue, in theory, until the final decision of the revisory power. This revision may take the form of a total disaffirmance or approval, or a partial approval with disaffirmance of portions of the judgment not approved. From the moment that a decision is rendered it becomes the final judgment in the proceeding, and is valid according to customary military law as recognized by our common law courts, even though portions of the sentence have been disapproved and only the remaining portions confirmed.[55] But, to repeat, there is no final judgment in the case until the appointing power has confirmed the sentence of the court martial.

The underlying reason for this is very interesting. The military court, in effect, renders no judgment, it merely recommends that a judgment be rendered. The power to whom this recommendation is made is in effect the executive power of the army; and it, as we have seen, is not bound to accept the court's report. The court, therefore, is really but a committee, which reports its findings of fact and conclusions of law to a non-judicial superior, whose primary function is of an

[52] See U. S. Govt. Man. 182; Davis *op cit.* 160.

[53] Matter of Poe, 5 B. & Ad. 681.

[54] Davis, *op cit.* 102.

[55] Carter *v.* McClaughry, 183 U. S. 365, 22 Sup. Ct. Rep. 181.

executive nature. Essentially, therefore, the powers of judgment and of punishment are intertwined with the power of direction. The common law conception of a court whose judgments are self-executing, is wholly lacking. There is, of course, the fact that originally by custom, and since the first Mutiny Act in England, by statute, the soldier has the right to a reference of his case to a court martial, and to go free of punishment unless that advisory board finds him guilty of the acts for which punishment is eventually awarded. But obviously the mere fact, that a court martial derives its power from statute, does not alter its essential character as a referee rather than a court of oyer and terminer.

Finally, it should be observed that the system of use in our army excludes entirely the practice of the "drum head" court martial. That was a court, held for the summary trial of offenses without written charges. Of its proceedings, unless capital sentence was imposed, no record was preserved. This practice formed a vital issue in the famous case of Rex *v.* Wall.[56] The defendant, formerly the military governor of Goree, was tried at the Old Bailey for causing the murder of a soldier, the latter having died from the effects of a flogging. The principal defense was that the soldier had been convicted of mutiny by a military court, that the sentence was in accordance with military law, and that the defendant, in causing the sentence to be executed, was merely performing his duty as commander of the place. The Crown, however, claimed that there had never been a court martial. No record of the trial had been made, and the evidence was that the alleged trial had

been summary, without written charges. The testimony showed that such trials, without record, were customary for minor offenses, but that where such a trial involved a more serious offense, it was customary to make a record and transmit it to headquarters in London. MacDonald, C. B., left it to the jury as a question of fact whether a military court had really been convened, whether it had duly tried the deceased, and whether it had sentenced him; if so, the jury should acquit. The evidence was conflicting, but the jury convicted the prisoner. No such situation could arise with us, because the record of every trial, even by a summary court martial, is preserved.[57]

The Articles of War are careful not to exclude from their prescriptions relating to courts martial as above defined, "military commissions, provost courts or other military tribunals of concurrent jurisdiction in respect to offenders or offenses that by the law of war may be lawfully triable" by such court.[58] The jurisdiction of these courts relates to matters of military occupation and martial law of which we shall hereafter speak. It is enough to say here that in all matters of procedure, they are governed by the practice obtaining in regular courts martial of the class above described.

[57] Manual Courts Martial, Sects. 366–367.
[58] Art. 15.

IV

THE ARMY'S RIGHT OF SELF-REGULATION

Our investigation has shown, it is to be hoped, that, so far as its laws and the correlative rights of its members are concerned, the functioning of the army should be a matter of self-control. The commission of offenses against the law and custom of the army, on the part of persons who are members of it, is to be judged by the governing powers of that organization, sitting in that respect in a judicial capacity; and the sanction of such laws is also a matter entirely within the control of the organization. One's first impression, therefore, might be that a common law court can find no starting point of review, in a controversy involving the commission of a military offense, if all the parties to that controversy are members of the army.

But the question whether a particular controversy was one within this exclusive jurisdiction or not, might well involve a question of fact or of law. The jurisdiction of a court martial depends upon whether the particular delinquent was or was not a member of the forces. Likewise the decision or act of a commander would depend, for its immunity from common law adjudication, upon whether or not it was justified by the powers conferred upon that commander by the custom and statutes governing the organization of the army.

Now the determination of that question cannot be left to the military court or to the commander, because to do that would be to deny the very proposition that there are limits to the court martial's jurisdiction or the commander's powers, which, of course, there are. Consequently it is for the common law court to decide, in the particular case, whether the military court had jurisdiction or the commander had power to act. Naturally the common law court will not make such a decision unless somebody, having interest in the premises, invokes its decision.

That can be done in a number of ways. First, as to the court martial: If a party is imprisoned under the judgment of a special court, he has the right by means of a writ of habeas corpus to test the question whether the special court had the power so to commit him.[1] If the court has not yet proceeded to judgment, the party accused may apply for a writ of habeas corpus. And finally the alleged delinquent may bring an action for damages against the officer of the court who executes its judgment of punishment upon him.[2] Second, as to the act of an officer: If the person injured by that act believes that it was not justified by any lawful authority, he may bring an action for damages against the officer in question.

[1] Of the numerous instances of such a method of procedure we may mention only Carter *v.* McClaughry, 183 U. S. 365, 22 Sup. Ct. Rep. 181; Rex *v.* Suddis, 1 East 306, and Kirkman *v.* McClaughry, 160 Fed. 436. In England it has been claimed that the courts could exercise a similar jurisdiction by means of a writ of prohibition, but such a writ cannot be had after the military court's judgment has been approved, because then *quo ad hoc* it has ceased to exist, Grant *v.* Gould, 2 H. Bl. 69; Matter of Poe, 6 B. & Ad. 681.

[2] Instances of such actions may be found in Wise *v.* Withers, 3 Cr. 331, and Dynes *v.* Hoover, 20 How. 65.

In this connection, however, our dual system, of Federal courts and State courts, intrudes itself. The State courts have no power, by means of habeas corpus, to take the body of a prisoner, held for court martial, from the custody of the officer detaining him, and hence they must dismiss the writ on a return being made showing that the prisoner is held under the authority of the United States or color thereof.[3] And in like manner our statutory Articles of War provide [4] that any civil or criminal prosecution, commenced in a State court "against any officer, soldier, or other person in the military service of the United States, on account of any act done under color of his official status, or in respect of which he claims any right, title or authority, under any law of the United States respecting the military officers thereof, or under any law of war" may be removed for trial into the United States District Court in the District where the suit or prosecution is pending. But the Federal courts also administer the common law; so the statutes give only a choice of civil courts, nothing more.

Now, as to the case where an inferior claims that he has been injured by the conduct of a superior: The defendant must show whether he acted by the explicit order of one still higher, or under the general authority of standing orders, the regulations, or the Articles of War. In the latter case the question he presents is whether his act was within his jurisdiction or *ultra vires;* but in the former case his act was purely ministerial, and must be justified as such.

[3] *In re* Neill, 8 Blatch. 156; Fed. Cas. 10089; Tarble's Case, 13 Wall. 397, and see generally Ableman *v.* Booth, 21 How. 506. But a return to the writ should be made, *Ex parte* Field, 5 Blatch. 63; Fed. Cas. 4761.

[4] Act of Aug. 29, 1916; 39 Stat. pt. I, c. 418, p. 619, Art. 117.

Taking the last case first, the defendant is in no different position from any other person acting in a ministerial capacity, and is entitled to the same measure of protection that the common law gives in such cases.

The common law view of such a matter is clear. The orders of a superior to commit a wrong do not excuse the commission of it. But the duty of obedience must carry a certain weight, at least when that duty springs from the obligation of public service rather than of contract. From this consideration has grown the rule that a ministerial officer, when executing an order or process "fair on its face," is not liable in damages should it develop that the process or direction should in fact not have been issued.[5]

There is no reason, according to the weight of authority, why this rule should not apply to the soldier, as concerns a ministerial rather than a discretionary act. Obedience is, as we have seen, recognized by common law courts as of the very essence of military service. If, then, the orders on their face show the authority of the power which issued them, to issue them, and are invalidated only by some extraneous fact to which they bear no reference, then the officer who acts under them is protected from an action by the inferior who is injured by the operation of these orders when carried into effect. That is the decision of Willes, J., one of the greatest of common-law judges, in Keighley *v.* Bell,[6] where the plaintiff, a captain in the British service, sued the defendant, a general therein. In granting a non-suit Willes, J., expressed the opinion that "a sol-

[5] See Chegaray *v.* Jenkins, 5 N. Y. 376.

[6] 4 F. & F. 763.

dier, acting honestly in the discharge of his duty—that is, acting in obedience to the orders of his commanding officer—is not liable for what he does, unless it be shown that the orders were such as were obviously illegal. He must justify any direct violation of the personal rights of another person by showing, not only that he had orders, but that the orders were such as he was bound to obey." The rule in our country now seems to be to the same effect. Despite the rather broad language in Little *v.* Barreme,[7] the soldier, like any other public officer, is protected by orders not palpably illegal.[8] The test is whether the order was such that "a man of ordinary sense and understanding would know that it was illegal."[9] To give the greater point to the proposition, it should be remembered that Smith *v.* Shaw,[10] which held to the opposite effect, has been overruled in its own State, the courts of New York finally coming to see no distinction between a soldier and any other public officer when acting under a direct order.[11]

Now let us turn to the officer whose act follows the exercise of discretionary power. It is then wholly a question of *ultra vires* or *intra vires*—a question, in short, of jurisdiction.

That question, from the viewpoint of a common law court, depends entirely upon the scope of the defendant's powers, as defined by the law of the army,

[7] 2 Cr. 170.

[8] Riggs *v.* State, 3 Coldw. Tenn. 85; U. S. *v.* Cutler, 1 Curt. 501, Fed. Cas. 14910; U. S. *v.* Clarke, 31 Fed. 710; Webb's Pollock on Torts 144; 1 Stephen, Hist. Criminal Law 205; Burdick, Torts, 2d ed. 42.

[9] U. S. *v.* Clarke, *supra.*

[10] 12 Johns. 257.

[11] Savacool *v.* Boughton, 5 Wend. 170; Chegaray *v.* Jenkins, 5 N. Y. 376.

whether that law be found in the Constitution, or in the codified or the uncodified portions of the military law. This rule applies to all persons in the service, from the President, its commander-in-chief, down through the non-commissioned officer.

When Congress has conferred upon the President power to draft the militia into the national service, whenever a national exigency requires it, then the President is vested with jurisdiction to decide whether an emergency has arisen of a nature justifying his calling the draft. Such was the decision in Martin *v.* Mott,[12] where Mr. Justice Story, speaking for the court, said: "that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. . . A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests." But where Congress, with whom exclusively, under the Constitution, the war-making power resides, has not given the President power to institute hostile acts against a particular country, then any direction by him, for the commission of an act of war against the subjects of such a country, is wholly unauthorized.[13]

It is so all the way down: The defendant must show, to avoid the condemnation of a common law court, that the act which he directed, or the decision which he

[12] 12 Wheat. 19.

[13] Little *v.* Barreme, 2 Cr. 170.

made, was within the scope of the powers conferred upon him. If the act or decision was within the defendant's lawful powers, then an error of judgment cannot deprive him of the protection of his office. He is liable for no such error. Only one thing can deprive him of the protection which he thus derives from his office, and that is express malice. In such a case the plaintiff's grievance is really of oppression, of abuse of office. In the absence of that, the defendant cannot be held, although, as member of a court martial, he joined in an erroneous decision,[14] or, as the commander in battle, gave a most ill-timed order.[15]

In the absence of a showing of express malice then, our inquiry is confined to the nature and extent of the defendant's powers. He must derive those powers from one or the other of the sources of law and authority governing the existence and operations of the army. If he cannot do so, there is but one view that the common law court can take. The act, not being justified by any portion of military law or regulation, naturally cannot find justification in any principle of common law. For that reason an action by an inferior against a superior has no analogy to a suit for malicious prosecution. The latter action postulates that previously a legal proceeding was instituted against the plaintiff by the defendant, though without just cause. But when a sergeant sues his captain for damages for assault, the essential inquiry is whether the captain's action was justified by military law. If it was not, then the captain's act lacked any element of legality under

[14] Dawkins *v.* Lord Rokeby, L. R. 7 H. L. 744.
[15] Sutton *v.* Johnson, 1 T. R. 510.

common law, and the question whether or not he had cause to perform the act is wholly immateral.[16]

Two cases illustrate the proposition. If, at sea, a sailor should claim that the time of his enlistment had expired, and that he should thenceforth be carried as a passenger or put ashore, it is for the commander to judge this question. In the absence of bad faith, the decision of the commander is final and the sailor has no right of action against him for damages resulting from his continued detention. That is Dinsman *v.* Wilkes.[17] "If," said the Supreme Court, "in his judgment the plaintiff was entitled to his discharge, it was his duty to give it, even if it was inconvenient to weaken the force he commanded. But if he believed he was not entitled, it was his duty to detain him in the service. Captain Wilkes might err in his decision. But that decision, for the time being, was final and conclusive; and it was the duty of the plaintiff to submit to it, as the judgment of the tribunal which he was bound by law to obey; and for any error of judgment in this respect, no action would lie against the defendant."[18] In the other case the defendant, a company commander, established a school for the education of non-commissioned officers, the expenses of the school to be deducted from their pay. The plaintiff, a sergeant, declining to go to school, the defendant ordered him under arrest, to be held for a summary court martial. The court martial acquitted him, and then he sued the defendant for false arrest. On its first hearing, these being the only facts on the record,

[16] Dinsman *v.* Wilkes, 12 How. 390; Johnson *v.* Sutton, 1 T. R. 546.

[17] 12 How. 390.

[18] Dinsman *v.* Wilkes (*supra*).

and it appearing that the Articles of War and regulations conferred no authority on a regimental commander to establish any such school, or to deduct pay from any non-commissioned officer for the support of such a school, the court held that a verdict for the defendant should be set aside, and a new trial ordered.[19] On the new trial the defendant offered evidence that the plaintiff had not merely refused to attend school himself, but had counseled other non-commissioned officers to do the same, this advice being given in a public tavern adjoining the barracks, and with much profanity and abuse of his officer. The court held that it was error to exclude this evidence, since it would have justified the defendant, as it was within the scope of his powers and authority, to order the arrest of the plaintiff, for the action of a court martial, on the charge of conduct to the prejudice of good order and military discipline. Consequently a second verdict for the plaintiff was set aside.[20] Thus the officer had no right to cause the sergeant's arrest for refusing to go to school, but he did have authority to cause his arrest for loud, public and boisterous abuse of his superior officer, in a public house adjoining the barracks. Whether the plaintiff was guilty of the acts charged before the court martial was immaterial; the question was whether these acts, if shown, were such as constituted an offense justiceable before the court martial; and the officer acted within the scope of his powers when, in the reasonable belief that such acts had been committed, he ordered the arrest of his subordinate for the action of the court martial.

[19] Warden *v.* Bailey, 4 Taunt. 65.
[20] Bailey *v.* Warden, 4 M. & S. 400.

If, decided by the criteria above given, the superior has in fact injured his inferior, then the fact that the latter could have his superior punished by court martial would not oust the jurisdiction of the common law court to maintain an action for damages against the superior. As was observed in the case last cited, by Lawrence, J., "a court martial cannot give damages for injurious conduct as a jury can." But that reason does not strike deep enough. The real proposition is simply whether the superior exceeded his jurisdiction. If he did, then the question of the military status of the opposing parties becomes, as a matter of logic, purely accidental.

It will thus be seen that, in determining the scope of the officer's power, the court must look to the military law, codified and uncodified, and to that extent it may be said to pass upon questions of military law. But it does so only for the purpose of settling the question of jurisdiction.

The point of view which the court adopts, however, in the effort to ascertain the scope of the officer's powers, is modified, to a more or less indefinable degree, by the circumstances of war on the one hand and of peace on the other. A military force quartered at home, not in the theater of war, is governed by considerations that will not apply to an army in the field, in full campaign; and the court, in determining the scope of the officer's powers, will take this into consideration. This is illustrated by two English cases, which remain today of full authority.

In Barwis *v.* Keppel [21] the plaintiff, a former sergeant, sued the defendant, his regimental commander, for

[21] 2 Wils. 314.

damages for reducing him from the grade of sergeant. It appeared that this act occurred while the regiment was in service in Germany. The court held that the action would not lie for two reasons: the first being that the Articles of War apply to the army only when it is within the realm, and outside the realm the royal prerogative in the government of the army is not restrained by the Articles of War. This point would not apply to our establishment, as our Articles of War, with certain exceptions which they themselves define, go with the army wherever it may be, at home or abroad. But the second point is of more interest. The court said that "*flagrante bello*, the common law has never interfered with the army; *inter arma silent leges*."

In Johnston *v.* Sutton [22] the plaintiff commanded a line of battle ship forming part of the force under the command of the defendant, an admiral, in an action with the enemy. The defendant ordered the plaintiff to make a certain manoeuvre, which the plaintiff failed to do. The defendant suspended the plaintiff from command, put him under arrest, and thus kept him until his trial by court martial on the charge of disobeying orders. The court martial acquitted the plaintiff, and thereupon he sued for damages for false imprisonment. It appeared that the action of the court martial was based on the fact that it was physically impossible for the plaintiff to obey the order. The Court of Exchequer Chamber held that the plaintiff could not recover, and this was affirmed by the House of Lords.[23] The reasoning of the Exchequer Chamber, as expressed

[22] *Supra.*

[23] 1 Bro. P. C. 76.

by Lord Loughborough, was substantially this: Nothing could excuse the plaintiff for disobedience to orders but physical impossibility. The commander had a right to have that question determined by court martial, and therefore had the right to send the plaintiff before the court martial, in the regular way of suspending him from command and putting him under arrest. If the commander had done this purely from motives of persecution, the plaintiff could, by means of a court of inquiry, have had the grievance redressed, without damages it is true, but redressed so far as his honor was concerned; and all of this lay exclusively within the jurisdiction of the military courts. Hence "every reason which requires the original charge to be tried before a military jurisdiction, equally holds to try the probable cause by that jurisdiction," and the defendant's act, if anything, is a "mere military offense."

It is, therefore, with substantial basis of authority that our Supreme Court, in discussing the liability of officers, draws a distinction between the rule in time of peace as "different from the rule in time of war, and in the presence of actual hostilities."[24]

The same considerations figure with the courts in determining the question of a court martial's jurisdiction. The common law court asks only one question, did the court martial have jurisdiction?—and guides its own conduct accordingly. If it did not, then the court must, on a habeas corpus proceeding, discharge the petitioner from custody, or in an action for damages proceed to judgment. If a commitment, by any such special court, "be against law, as being made by one who had no juris-

[24] Bates *v.* Clark, 95 U. S. 204.

diction in the case, or a matter for which by law no man ought to be punished," the common law court ought to discharge.[25] "If a court martial," says the Supreme Court, "has no jurisdiction over the subject matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress."[26] It follows then that there is one issue of fact or of law which the court martial cannot conclusively determine, and that is the question of jurisdiction. This is clearly shown by such cases as Wise *v.* Withers,[27] Martin *v.* Mott,[28] and Dynes *v.* Hoover.[29]

In Wise *v.* Withers and Martin *v.* Mott [30] the plaintiff brought suit against the officer who executed the judgment of a court martial, the judgment taking the form of a fine. The officer, to satisfy the fine, levied upon the plaintiff's goods. In Martin *v.* Mott the plaintiff brought replevin for the goods, and in Wise *v.* Withers the plaintiff brought an action of trespass for damages. The plaintiff failed to recover in Martin *v.* Mott because the Supreme Court held that he, being a member of the New York militia, was subject to the jurisdiction of the court martial from the moment when the order was issued drafting the New York militia into the national

[25] Bac. Abr. Habeas Corpus, Sect. 10; *Ex parte* Siebold, 100 U. S. 371.
[26] Dynes *v.* Hoover, 20 How. 65.
[27] 3 Cr. 331.
[28] 12 Wheat. 19.
[29] *Supra.*
[30] *Supra.*

service. The court, therefore, having jurisdiction, the sole question involved in the replevin action was determined against the plaintiff. In Wise *v.* Withers, on the contrary, the plaintiff was a justice of the peace of the District of Columbia, and the question was whether or not he was such a judicial officer as to be exempt from militia duty in the District under the Militia Act, relating to the District, of March 3, 1803. The Supreme Court held that a justice of the peace was a judicial officer, and hence the court martial had no jurisdiction to impose the fine; the court saying: "It follows, from this opinion, that a court martial has no jurisdiction over a justice of the peace, as a militiaman; he could never be legally enrolled; and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers."[31]

In Dynes *v.* Hoover[32] the plaintiff, a seaman in the Navy, was convicted by a court martial of attempting to desert and sentenced to imprisonment. He brought an action for damages against the officer executing the sentence of imprisonment. It was held that he could not recover because, he being in the service, the court martial had jurisdiction; the court using language which disposes of the entire question: "A judge, or any person acting by authority as such, where he has, over the subject matter and over the person, a general jurisdiction which he has not exceeded, will not be liable to have his judgment examined in an action brought against himself; but if jurisdiction be wanting over the

[31] Wise *v.* Withers, 3 Cr. 331, 337.
[32] *Supra.*

subject matter, and over the person, such judgment would be examinable."[33]

Nor can there be any direct review by a common law court of a court martial's decision. The court martial may err in matters of evidence, but no common law court can say that its judgment was void for that.[34] It may err in its conception of the elements of the crime charged, yet if it has jurisdiction to try the accused, its error, even in such a substantive matter, cannot be reviewed in a common law court.[35] Such errors, as any lawyer knows, are reviewable only by way of appeal; but there must be some machinery of appellate procedure provided, before the rulings of a court martial, of the class described, can get before the common law court. Appeal is not a matter of common law, but always of statute, and therefore the common law court must look to a statute giving it appellate powers concerning actions of courts martial. There are no such statutes in this country. Until 1907 courts martial formed no part of the judicial system of either Great Britain or the United States.[36] In that year the English statute creating the new Court of Criminal Appeal gave it jurisdiction of appeals from courts martial,[37] but we have no such law. No collateral attack, whether by means of a writ of habeas corpus, to relieve a prisoner from the custody of a court martial,[38] or action for damages against an officer acting within the scope of his

[33] Dynes *v.* Hoover (*supra*).
[34] Grant *v.* Gould, 2 H. Bl. 69.
[35] Rex *v.* Suddis, 1 East 306.
[36] *Ex parte* Valandigham, 1 Wall. 243.
[37] Stat. 7 Edw. VII, c. 23, Sect. 3.
[38] *Ex parte* Reed, 100 U. S. 13; Barrett *v.* Crane, 16 Vt. 246.

powers,[39] can bring up for review any matters except those of jurisdiction. "The single inquiry, the test, is jurisdiction."[40] The Supreme Court, also, has anxiously stated that it "must not be understood by anything we have said, as intending in the slightest degree to impair the salutary rule that the sentences of courts martial, when affirmed by the military tribunal of last resort, cannot be revised by the civil courts save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of power possessed."[41]

The proposition thus laid down must not be confused with the special power conferred by the Selective Service Act on the draft tribunals. The very function of a draft board under the statute is to decide whether or not the candidate is within the class prescribed by statute, and hence its decision, though involving the very question of status, should not be open to review through habeas corpus or otherwise by a common law court.[42] The question of status, therefore, under the present system, can remain for a common law court to determine only in the cases of members of the National Guard or regular army, on whose status the draft examination boards do not pass.[43]

[39] Dynes *v.* Hoover (*supra*).

[40] *In re* Grimley, 137 U. S. 147, 11 Sup. Ct. Rep. 54.

[41] Carter *v.* McClaughry, 183 U. S. 365, 22 Sup. Ct. Rep. 181.

[42] *Ex parte* Troiana, 245 Fed. 360; Angelus *v.* Sullivan, 246 Fed. 54; U. S. *v.* Kinkead, 248 Fed. 141; Frank *v.* Murray, 248 Fed. 865; Blackington *v.* U. S., 248 Fed. 124; Summertime *v.* Local Board, 248 Fed. 832. It was decided otherwise, however, under the Draft Act of the Civil War. Antrim's Case, 5 Phila. 288. The rule so far established under the present statute is more consonant with reason. Of course, judicial relief will be given if the board should deny the candidate an opportunity to be heard before it. Angelus *v.* Sullivan, (*supra*).

[43] See *ex parte* Dostal (*supra*).

Only one thing more remains for notice, and that is the extent of the concurrent jurisdiction of courts martial and common law courts. Many of the Articles of War treat as offenses against military discipline acts which also constitute crimes; murder and rape, indeed, being excepted from the Articles of War in time of peace, when such acts are committed "within the geographical limits of the States of the Union and the District of Columbia."[44] Now, if a soldier's wrongful act constitutes at the same time an offense against military discipline, punishable by a court martial, and a crime forming the subject for prosecution in a civil court, it is obvious that neither tribunal can say that the other has no jurisdiction. The only thing that can be said is that the jurisdictions are concurrent. "We do not mean," said the Supreme Court, "to intimate that it was not within the competency of Congress to confer exclusive jurisdiction upon military courts over offenses committed by persons in the military service of the United States."[45] But the fact is that Congress never took any such action. Of this proposition there has never been any doubt, heretofore, even in time of war.[46] Recently, however, a District Court has decided that a court martial has jurisdiction, exclusive of that of the appropriate State court, of a charge of murder when committed by a soldier in the streets of a Kentucky town

[44] Article of War 92. Prior to the first Mutiny Act desertion was a felony at common law, Rex *v.* Beal, 3 Mod. 124, but the effect of that statute was to make it purely a military offense (See *re* Cadwalader, 127 Fed. 881).

[45] Coleman *v.* Tennessee, 97 U. S. 509.

[46] Coleman *v.* Tennessee (*supra*); Franklin *v.* U. S., 216 U. S. 559, 30 Sup. Ct. Rep. 434.

not under military control.[47] But the court's reasoning lacks cogency, because it is based on Coleman *v.* Tennessee,[48] whereas that case, dealing as it did with a crime committed in a hostile district, under military occupation, contains no dictum that is applicable to a crime committed in an American town in which no conditions of military control exist. Certainly the writer can find nothing in the Articles of War to warrant the court's conclusion.

What is meant by concurrent jurisdiction is that if one court does not act, the other may. The Seventy-fourth Article of War gives precedence, at least in time of peace, to the civil jurisdiction, by requiring offenders to be handed over to the civil authorities;[49] but if the civil authorities do not take the proper steps to prosecute the offender, then it is "the clear duty of the military to bring him to trial under that jurisdiction."[50] When the accused is put upon his trial in either of two courts having jurisdiction, the fact that the other court could have tried him, had a proceeding to that effect been seasonably instituted, constitutes no defense in substance or in form, and this indifferently, whether the court to which objection is made be the military [51] or the civil court.[52]

In this connection we must not be confused by questions of jurisdiction as between State courts and Federal courts. Federal legislation has given criminal jurisdic-

[47] *Ex parte* King, 247 Fed. 868.

[48] 97 U. S. 509. See *infra*, Ch. VI.

[49] See U. S. *v.* Lewis, 129 Fed. 823.

[50] *Ex parte* Mason, 105 U. S. 696.

[51] *Ex parte* Mason (*supra*); Carter *v.* Roberts, 177 U. S. 496, 20 Sup. Ct. Rep. 713; Carter *v.* McClaughry (*supra*).

[52] Franklin *v.* U. S., 216 U. S. 559, 30 Sup. Ct. Rep. 434.

tion to Federal courts over offenses committed within certain Federal territory, such as government reservations, etc.[53] This has resulted in a number of Federal decisions releasing, by way of habeas corpus, a soldier from the custody of a State court for an offense committed within a Federal reservation, or in connection with a Federal prisoner.[54] These cases, however, dealt with a conflict of jurisdiction, not between military and civil courts, but between two kinds of civil courts.

And, finally, the case of Grafton *v.* U. S.[55] clears up the only doubt which the Supreme Court, rather wilfully, had left open in *Ex parte* Mason.[56] There was never a doubt that an acquittal by a civil court could be pleaded in bar to a subsequent proceeding by courts martial, and the reverse of the proposition, logically, should have been just as clear. But it required the Grafton case to make it clear. The appellant, a soldier of our army, while on sentry duty, shot a Filipino. The civil court not acting promptly, Grafton was tried by court martial on a charge of homicide, but not murder, because, it being in time of peace, the court martial could not try him for murder. He was acquitted. Thereafter the local civil court put him on trial for murder, to which he pleaded his previous acquittal in the court martial. This plea was held bad, and thereupon Grafton was tried on the general issue and convicted. On appeal, the Supreme Court held the plea

[53] See enumeration of these statutes in Franklin *v.* U. S. (*supra*).

[54] See U. S. *v.* Lewis, 200 U. S. 1, 26 Sup. Ct. Rep. 229; U. S. *v.* Clarke 31 Fed. 710; *In re* Fair, 100 Fed. 149; U. S. *v.* Lipsett, 156 Fed. 65.

[55] Grafton *v.* U. S., 206 U. S. 333, 27 Sup. Ct. Rep. 749.

[56] *Ex parte* Mason (*supra*).

good, and therefore reversed the judgment of conviction. The grounds for this decision were (1) "the prohibition of double jeopardy is applicable to all criminal prosecutions in the Philippines," (2) as the court martial had jurisdiction to try Grafton, "its judgment will be accorded the finality and conclusiveness, as to all the issues involved, which attend the judgments of a civil court in a case of which it may legally take cognizance," and (3) the acquittal on a charge of homicide is essentially a bar to a prosecution on a charge of murder, on principles familiar to all common law practitioners.

Naturally the judgment of a court martial can have no higher value than the judgment of a common law court. With this in mind we can understand the decision in U. S. *v.* Clark.[57] As between the parties to it, a judgment is conclusive as to the matters litigated, and, even though not pleaded as *res judicata*, it has also probative force,[58] but as between other parties it has no value, by way either of *res judicata* or evidence. In U. S. *v.* Clark [59] two soldiers had stolen government funds from the custody of an assistant paymaster, and the latter, under the statute, was liable absolutely for their loss to the government. The two thieves were afterwards convicted of the larceny by court martial, largely on the claimant's testimony. Then the claimant filed in the Court of Claims, which had jurisdiction to determine his liability, a petition for relief. It was held that the petition should have been dismissed because the claimant did not testify, and the only evidence in

[57] U. S. *v.* Clark, 96 U. S. 37.

[58] Duden *v.* Malloy, 43 Fed. 407; Krekeler *v.* Ritter, 62 N. Y. 372; Gugel *v.* Hiscox, 216 N. Y. 145, 110 N. E. 499.

[59] *Supra.*

support of his petition was afforded by the record of the court martial, which involved parties different from those in the instant suit. Such evidence was incompetent.

Finally, it should be mentioned that the care with which the common law courts scrutinize the boundaries of a court martial's jurisdiction, has in it nothing of jealousy or of distrust. A court martial is composed of our own fellow citizens actuated by the same desire to administer justice as impels to his duty the judge of any common law court in the land. The guilty need fear its process to no greater or less degree than he need fear the vindicatory power of a common law judge. Nor need the public fear its favoring men of the service. Indeed, we may find in history, judicial and otherwise, instances of the guilty officer or soldier much preferring the civil jurisdiction. We need only mention the case of Captain Oberlin Carter from our own records, and one from the records of a country which, although different in its system of law and language, has always been close to us—France. Marshal Ney, when punishment hung over his head for his undoubted act of treason in going over to Napoleon in desertion of the sovereign to whom he had taken the oath of allegiance, stated that he infinitely preferred to be tried by the Chamber of Peers rather than by a court martial composed of his old comrades. The latter, to use his expression, undoubtedly would have shot him "like a rabbit,"[60] but they would have done so only because of his clear guilt as it would have appeared to them on his trial.[61]

[60] *Me fusilleraient comme un lapin.*

[61] Houssaye, "1815—La Seconde Abdication et la Terreur Blanche," pp. 570–571.

V

THE ARMY IN ITS RELATIONS WITH THE ENEMY

As against the public enemy, using that term to denote a sovereign state *de jure* or *de facto*, other than our own nation, the army may be used only in time of war. So far as the common law is concerned, war, as to commencement, duration and termination, is a matter of state. The war commences when government officially says it has commenced, and it ends when government says it has ceased to exist.[1] Nothing short of State-recognized belligerency, therefore, is war in the view of our courts; strained relations, however prophetic of hostilities, do not constitute flagrancy of war.[2]

As we have seen, the Constitution places with Congress the power of declaring war. It follows that, although the conduct of the war, once its state is created by Congressional action, is with the President, yet the latter has no power to direct the armed forces of this country against any nation with whom, for the lack of action by the legislative branch of our government, we are at peace.[3]

But such executive acts, however unauthorized, may be ratified by later Congressional action. "I am per-

[1] Thus, so far as our courts were concerned, the Civil War terminated when the President proclaimed its cessation, as of April 2, 1866. *The Protector*, 12 Wall. 700; Lamar *v.* Brown, 92 U. S. 187.

[2] Janson *v.* Dreifontein Mines, 1902 A. C. 484.

[3] Little *v.* Barreme, 2 Cr. 170.

fectly satisfied," says Story, J., "that no subject can commence hostilities or capture property of an enemy, when the Sovereign has prohibited it. But suppose he did, I would ask if the Sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"[4] The Supreme Court, in the time of our Civil War, repeated this proposition in the *Prize Cases*.[5] The court there referred to the fact that the battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress recognizing a state of war with Mexico, and said that "this act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the President in accepting the challenge without a previous formal declaration of war by Congress." In the same way the court refers to the fact that in the Civil War, Congress, at its first session after the attack on Fort Sumter, enacted a law ratifying all intervening acts of the executive authority. It follows that the only interest of our courts in such a matter is in whether, originally or by ratification, Congress has authorized the state of war; if so, the army may lawfully operate against the enemy.[6] But as the enemy state consists of subjects of all grades and classes, as well as a government and armed forces of its own, it is now in order to

[4] Brown *v.* U. S., 8 Cr. 131.

[5] 2 Black 635.

[6] The requirement of a declaration of war prior to hostilities, is one of those matters of international law with which common law cannot deal. As a matter of passing interest it may be noted that this obligation, *de rigeur* in the Eighteenth Century, but fallen into desuetude during the course of the Nineteenth, is again of force, by virtue of provisions to that effect contained in the Second Hague Convention. (See Bordwell, Law of War, 36 sq. 186, 198).

define more closely the term enemy, so far as our army's efforts in war may be concerned.

Within the term enemy is included not merely the opposing government, but human beings as well. That proposition, of course, conflicts with the Rousseau theory which has been previously discussed.[7] And it must be granted that the vogue which that theory obtained in the Eighteenth Century found small opposition in the common law doctrines then in force concerning trading with the enemy.

About the middle of the Eighteenth Century we find Lord Hardwicke saying that "no determination has been made that insurance on enemy's ships during the war is unlawful; it might be going too far to say all trading with the enemy is unlawful."[8] So far from feeling that such contracts were against public policy, it was a distinct belief of Lord Mansfield that trading with the enemy should be encouraged. Indeed, his associate, Buller, J., quotes the Lord Chief Justice as having said "in many conversations" that "it was a good thing to promote insurance of enemy property."[9]

It was from a very different direction that the modern view came. In *The Hoop*[10] Lord Stowell held that an insurance contract made with an enemy is void, and it appeared that his predecessor in the admiralty had made a similar though unreported decision. In other words, the prize court, whose law comes from "the course of the admiralty and the law of nations"[11] con-

[7] *Supra* Ch. II.
[8] Henkel *v.* Royal Ins. Co., 1 Ves. Sr. 317.
[9] Bell *v.* Gilson, 1 B. & P. 345.
[10] 1 Ch. Rob. 196.
[11] See *The Zamora*, 1916, 2 A. C. 77.

sidered that such transactions were wholly inconsistent with any respectable system of law. The common law courts then gradually adopted the view of the admiralty,[12] and the court of chancery, presided over by Lord Stowell's brother, Lord Eldon, took the same view,[13] Lord Eldon considering that any such bargain is "for a trade to be carried on in fraud of the laws of the country." When, in consequence of the Crimean War, the English courts came to consider the matter again, they took it that the doctrine was then clearly settled, the reason of it being, as stated by Willes, J., that "the proximate object of war is to curtail the enemy's commerce as well as to capture his property."[14] So today all nations seem to be governed by the idea expressed by Lord Parker: "The rule against trading with the enemy is the belligerent's weapon of self-protection . . . Though it has been said by high authority to aim at curtailing the commercial resources of the enemy, it has, according to other and older authorities, the wider object of preventing unregulated intercourse with the enemy altogether. Through the Royal License, which validates such intercourse and such trade, they are brought under necessary control. Without such control, they are forbidden."[15] These Royal Licenses were always given; and in all of the cases, beginning with *The Hoop*,[16] the courts accepted licensed trading. When the present war broke out the English Crown issued two proclamations relating to trading, *viz.*, No. 1

[12] See Potts *v.* Bell, 8 T. R. 548.
[13] Evans *v.* Richardson, 3 Mer. 469.
[14] Exposito *v.* Bowden, 7 E. & B. 763.
[15] Daimler Company *c.* Continental Tire Co., 1916, 2 A. C. 307.
[16] *Supra.*

of August 5, 1914, and No. 2, which was substituted for the former, of September 9, 1914. These were followed by the Trading with the Enemy Act, 1914.[17] Both proclamations recited that "it is contrary to law for any person resident, carrying on business, or being in our dominions, to trade or have any commercial intercourse with any person resident, carrying on business, or being in the German Empire without our permission." There we have the idea of royal license clearly stated. The proclamation, in the words of Lord Shaw, told the public "that a transaction permitted under proclamation should not be deemed trading with the enemy,"[18] and, as stated by the English courts, the effect of the statute and the proclamations was to leave the matter exactly as it was at common law, the only advantage of the proclamation being that it gave a universal license to permit transactions instead of express license in the particular act.[19] The only additional advantage in the English Trading with the Enemy Act is that it contains inquisitorial powers which have already shown their value.[20]

On the outbreak of our Civil War, the United States Congress convened in extra session on July 4, 1861, and as Mr. Justice Nelson says,[21] one of its first acts was

[17] 4 and 5 Geo. V., c. 87.

[18] Daimler Company *v.* Continental Tire Co. (*supra*).

[19] Robson *v.* Premier Oil Co., 1915, 2 Ch. 124.

[20] Lord Reading, C. J.: "I might add that under the Trading with the Enemy Act, 1914, and the power given thereby to send an inspector at the instance of the Board of Trade into the office of the firm and inspect the books, an inspector was sent, and there was an examination of the documents of the firm, and in consequence information obtained on which no doubt the prosecution was launched. The Act was passed with the object of obtaining information which could not be obtained otherwise, and which could be used as evidence against the person from whom the information had been obtained." Rex *v.* Kupfer, 1915, 2 K. B. 321.

[21] Prize Cases, 2 Black 635.

that of July 13, 1861.[22] This statute provided that the President might declare a state of insurrection existing in certain territory whose extent his proclamation should define, and that thereupon all commercial intercourse with the people of the hostile section should be unlawful as long as hostilities should continue; but that the President might license commercial intercourse with any part of that section, and that such intercourse should be conducted pursuant to regulations prescribed by the Treasury. This statute the courts strictly applied. No one but the President could grant a license; hence "those given by military authorities were nullities. They conferred no rights whatever. No one could give them but the President. From any other source they were void."[23] But while no governmental department other than the Treasury, could issue these licenses, the Treasury in the sphere of action thus allotted it, was supreme. The Treasury used its power, as might have been expected, largely for the purposes of national revenue, and the courts upheld it in this course.[24] In Hamilton *v.* Dillin [25] regulations prescribed by the Treasury were upheld, as to trading in cotton, even though they required the concessionaire to pay the government four cents per pound on each bale he might purchase.

Similar permits were issued by the President during the Mexican War.[26] And in our present conflict, as in

[22] 12 Stat. 125.

[23] *The Ouachita Cotton*, 6 Wall. 521; McKee *v.* U. S., 8 Wall. 163; *The Sea Lion*, 5 Wall. 630.

[24] *The Reform*, 3 Wall. 617.

[25] 21 Wall. 73.

[26] See, for an example of such a license, Mitchell *v.* Harmony, 13 How. 115, discussed *infra*.

the Civil War, Congress has expressly authorized the President to license such trading as he may approve.[27] In short, to use the Supreme Court's language, "if such a course of dealing is to be permitted at all, it must necessarily be upon such conditions as the government chooses to prescribe. The war power vested in the government implies all this without any specific mention of it in the constitution."[28] Even in the absence of Congressional action, however, there would seem to be little doubt that the President, "who is constitutionally invested with the entire charge of hostile operations" could grant such licenses [29] despite the fact that, in the words of Lord Stowell,[30] any such license effects "a partial suspension of the war."

The holder of such a permit marches within the protection of the common law, and for seizure of his goods a military commander is liable in trespass; whereas the absence of such a permit places the trader, as to so much of his goods as may be in enemy country, in the position of an owner of enemy goods, and he cannot sue the commander who destroys them. That is the very distinction between such a case as Mitchell *v.* Harmony [31] and Dow *v.* Johnson.[32] The first case we will hereafter discuss.[33] In Dow *v.* Johnson, the plaintiff, loyal to the North, owned a plantation in Louisiana, which the defendant, the military commanding officer, stripped. For that act, afterwards, the plaintiff sued

[27] Trading with the Enemy Act, October 6, 1917.
[28] Hamilton *v.* Dillin, 21 Wall. 73.
[29] Hamilton *v.* Dillin (*supra*).
[30] *The Hoop*, 1 Rob. 199.
[31] 13 How. 115.
[32] 100 U. S. 158.
[33] *Infra*, Ch. VIII.

him. In holding for the defendant the Court said: "We do not controvert the doctrine of Mitchell *v.* Harmony; on the contrary, we approve of it. But it has no application to the case at bar. The trading for which the seizure was there made had been permitted by the Executive Department of our Government. The question here is, what is the law which governs an army invading an enemy's country?"[34]

The evolution of doctrine and practice thus outlined reflects the entire viewpoint of present day common law. However irresponsible the enemy government may be, whether or no it rules its people like an old-time despot, or constitutes that most curious, and to the Anglo-Saxon or Gallic intellect, almost incomprehensible thing, socialistic despotism, still no nation, on going to war with such a government, can get far with the theory that the war is only waged against that government. From the lawyer's standpoint, as well as that of the soldier, war, of necessity, is waged against the individuals and assets whose labor or productivity enables the enemy government to maintain its existence. Such a clear proposition must not be confused with the programme, which formed a basis for the wars of Allied Europe against Napoleonic France, that a change of government will be a signal for peace. That is quite another thing from saying, as all lawyers must say, that, so long as a state of war does exist, it is waged, not merely against a government, but against people. Our present war, therefore, is waged not merely against the German Emperor and his sons, but against many millions of other Germans of more or less varying likeness.

[34] Dow *v.* Johnson, 100 U. S. 158.

And so with all other wars; wherefore the necessity of defining the term enemy in more than words of government.

Obviously, the first classification must rest upon citizenship, as defined by the laws of the respective countries, and recognized by international law. A German citizen, as such, is *ex vi termini* an enemy, wherever he may be, at home, abroad, or here. The tie of allegiance to the hostile government is what fixes his status, and therefore, the location of either his domicile or his property is wholly immaterial.

In a situation like that presented by our Civil War, the question of allegiance takes us over a very delicate surface. Without discussing, on the one hand, the historical aspects of the subject, or its constitutional aspects, on the other, let us note that at an early date in the Civil War the Supreme Court attributed to the Confederacy all the qualities of a *de facto* belligerent; it resulting that Southern ports could be declared in a state of blockade, and that a neutral ship attempting to run the blockade would be lawful prize.[35] Similar necessities, such as of upholding the principles of military government in occupied parts of the South, led the United States Government, as recognized by the Supreme Court, to take a certain well-defined position: *First.* The war, "though not between independent nations, but between different portions of the same nation, was accompanied by the general incidents of an international war."[36] In short, it took "the proportions of a territorial war, the insurgents having become for-

[35] Prize Cases, 2 Black 635.

[36] Dow *v.* Johnson, 100 U. S. 158.

midable enough to be recognized as belligerents;"[37] *Second.* The Confederate government, though entitled to no recognition as to legislative powers, was at least recognized as "the military representative of the Confederacy," and the Confederate armies had belligerent rights as to organization, officers and men;[38] *Third.* Therefore "the people of the loyal States on the one hand, and the people of the Confederate States, on the other, thus became enemies to each other, and were liable to be dealt with as such without reference to their individual opinions or dispositions."[39] There was only this difference, that no one residing in the North could claim allegiance to the Confederacy. His allegiance was only to the United States government, and no hostile act of his could be considered as less than treason.

For persons thus owing allegiance to the enemy government, there is but one line of classification, but it is of vital importance to those who serve in our forces. This line divides them into belligerents on the one hand, and non-combatants, or civilians, on the other. The belligerent may belong to the land or sea forces, but, for the purposes of our discussion, we may call him the soldier, and the other class may be called civilians. Each of these classes has certain rights, and to the members of each our forces owe certain duties.

The belligerent class may be dismissed with a word. The soldier is entitled to the rights and obligations that the common laws of war allow him. The civilian, on the

[37] Coleman *v.* Tenn., 97 U. S. 509.
[38] Ford *v.* Surget, 97 U. S. 594.
[39] Dow *v.* Johnson (*supra*).

other hand, rests under an entirely different set of rules, as to his person and property, of which more will be said later. One observation, however, may properly be made at this juncture: the civilian deprives himself of all the rights allowed him by military law if he abuses his status. The enemy citizen, in short, must choose between the status of soldier and that of civilian. An attempt to exercise the powers of the soldier, without previously assuming the corresponding status, is a violation of a long-standing rule of law—a rule of which we find frequent manifestations in the wars of the nineteenth century.[40] The severities practised by the Germans in 1870, for violations of this rule by French civilians, are notorious enough. But the Germans were correct in their propositions of law; the only trouble with them was that then, as again in 1914, they showed themselves unfit ministers of justice. Under color of law they exhibited a spirit of cruelty incompatible with all theories of sanction. But the laws of war remain of force, however unworthy may be those who for the time being have the power of administering them; and no rule of this system is better established than the one under mention. When Wellington, with an auxiliary Spanish army moving with him, crossed the Bidassoa in 1813, and stood upon the invaded soil of France, he had to meet two difficulties; the Spanish army took to plundering, and this excited the French peasantry to acts of hostility. Wellington was equally firm on both points. The Spanish commanders he admonished that plundering must cease, or their forces could no longer march

[40] As to the distinction between the lawfulness of the *levee en masse*, and the illegality of acts of the *franc tireur* or "bushwhacker," see Birkhimer, Military Government and Martial Law, p. 125 *et seq.*

with him. "He had not lost thousands of men to enable the Spaniards to pillage and ill-treat the French peasantry; he preferred a small army obedient to a large army disobedient and undisciplined. . . . The question between them was whether they should or should not pillage the French peasants. His measures were taken to prevent it," etc.[41] On the other hand, when the Spanish plundering had made the peasants rise in arms, Wellington issued a proclamation requiring them either to join Soult's army or stay at home, otherwise he would burn villages and hang the inhabitants. "Thus," says Napier, "notwithstanding the outcries against the French for this system of repressing the partida warfare in Spain, it was considered by the English general justifiable and necessary."[42]

The whole subject finds excellent presentation in the remarks of the historian Ropes, concerning one of several orders issued by General Pope, when he took command of the forces in Virginia. Mr. Ropes' comment on it is of the greatest value:

> Another order provides that non-combatants in the rear of the army shall be responsible in damages for injuries done to the track of railroads, attacks on trains, assaults on soldiers, committed by Guerillas—that is, by individuals not enlisted among the organized military forces of the enemy. Any injuries to tracks, etc., are to be repaired by the neighbors, or an indemnity paid; so, where soldiers are fired on from a house, the house shall be razed to the ground, and the occupants of it treated as prisoners. Harsh as these measures may seem to those who believe themselves to be defending their homes from an invader, it is certain that

[41] Napier, Peninsular War, Book 23, c. 3.
[42] Napier, *id.*

they are clearly warranted by the laws of civilized warfare. The only safety for the non-combatant population of an invaded country consists in the rule by which they are forbidden acts of private hostilities.[43] ....

The only substantial subject of controversy in this connection involves a detail in the application of the doctrine. To enable our army to distinguish between the enemy civilian and the enemy soldier, what must the enemy of either class do? The Prussians in 1870 required every enemy combatant not merely to have evidence of his enrolment in a military force organized by the French government, but also to wear a distinctive uniform or mark of dress. The first requirement goes to the essence, but the second is, in the opinion not merely of a theorist like Bluntschli [44] but of practical soldiers with knowledge of conditions that obtained in our Civil War, wholly unnecessary, and also impossible of enforcement short of involving the murder of honestly enrolled combatants.[45] Enrolment in the regular forces, and evidence of the same should be sufficient for practical purposes.

The definition of the enemy is not exhausted with the test of allegiance. We must now deal with another enemy class, of equal importance. With its definition, citizenship plays no part, but residence, in one case, and situs of property, in another, are determining features.

"In war," says our Supreme Court, "all residents of enemy country are enemies."[46] And in another case

[43] Ropes, The Army under Pope, 10.

[44] Laws of War, Sect. 61.

[45] Birkhimer, *op. cit.*, p. 128 *et seq.* See also, Merignhac, Lois et Coutumes de la Guerre Sur Terre, 71 seq.

[46] Lamar *v.* Brown, 92 U. S. 187.

that Court has declared that "it is ever a presumption that inhabitants of an enemy's territory are enemies, even though they are not participants in the war, though they are subjects of neutral States, or even subjects or citizens of the government prosecuting the war against the State within which they reside."[47] There can be no question of this proposition, which, originating many years ago[48] has again been affirmed by the English courts during the course of the present war.[49] In the same way of taking facts of residence rather than allegiance, it is clearly settled that the nature of enemy soil is to be determined not by matters of right or *status quo ante*, but of physical possession. Any soil is enemy soil, no matter how forcible may be

[47] Miller *v.* U. S., 11 Wall. 268.

[48] McConnell *v.* Hector, 3 B. & P. 113. "By uniting themselves to the cause of a foreign enemy they cast in their lot with his, and they cannot be permitted to claim exemptions which the subjects of the enemy do not possess. Depriving them of their property is a blow against the hostile power quite as effective, and tending quite as directly to weaken the belligerent with whom they act, as would be confiscating the property of a non-combatant resident. Clearly, therefore, those must be considered as public enemies, and amenable to the laws of war as such, who, though subjects of a state in amity with the United States, are in the service of a state at war with them, and this not because they are inhabitants of such a state, but because of their hostile acts in the war. Even under municipal law this doctrine is recognized. Thus in Vaughan's Case, 2 Salkeld, 635, Lord Holt laid down the doctrine, 'If the States (Dutch) be in alliance, and the French at war with us, and certain Dutchmen turn rebels to the States, and fight under the command of the French king, they are enemies to us, for the French subjection makes them French subjects in respect of all nations but their own'. So, 'if an Englishman assist the French and fight against the King of Spain, our ally, this is an adherence to the king's enemies'," Miller *v.* U. S. 11 Wall 268, 311.

[49] Daimler Co. *v.* Cont. Fire Ins. Co., 1916, 2 A. C. 307, Porter *v.* Freudenberg, 1915, 1 K. B. 857. "Residents of the hostile country, in short, are enemies without reference to their personal sentiments and dispositions." Prize Cases, 2 Black 635; Williams *v.* Bruffy, 96 U. S. 176; and Dewing *v.* Perdicaries, 96 U. S. 193, as stated in Ford *v.* Surget, 97 U. S. 594.

the manner of its occupation, or wrongful in its inception, even though, prior to the enemy's invasion, it formed part of our own domain. This proposition, sustained nearly a century ago by our Supreme Court [50] and, during the present war by the House of Lords [51] is admirably shown by our case of United States *v.* Rice.[52] In an action on a Custom House bond, for goods imported into Castine, Maine, during its occupation by the British troops, was pleaded duress, arising from these facts: Previously the War of 1812 broke out, and the British troops captured Castine, and held it during the balance of the war. During their occupation, the British military authorities opened a custom house in the place, and appointed a collector. The goods in question were imported by residents of Castine, who, though United States citizens, continued to reside there, under the British occupation, and they paid the duties to the British military collector. After the treaty of peace, the British evacuated Castine, and the United States resumed possession, whereupon the United States collector seized the goods, and released them only upon the bond in suit being given. The Supreme Court considered that the bond was not enforceable, and consequently upheld the plea on demurrer, saying, through Story, J.:

By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was,

[50] *Thirty Hogsheads of Sugar*, 9 Cr. 191; U. S. *v.* Rice, 4 Wheat. 246.
[51] *The Gutenfels*, 1916, 2 A. C. 112.
[52] 4 Wheat. 246.

of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions.

But though such be the effect of occupation, yet the occupation is no less an act of *force majeure*, rather than one of state. Whether or not there was such occupation, therefore, is a question of fact, not one of state, and hence the courts can decide it like any other question of fact.[53]

In the same way may property become subject to treatment as though it belonged to an enemy, entirely irrespective of either the owner's allegiance or his residence. "Whether property be liable to capture as 'enemies' property' does not in any manner depend upon the personal allegiance of the owner. It is of no consequence whatever whether it belongs to an ally or a

[53] *The Gerasimo*, 11 Moore P. C. 101.

citizen. The owner, *pro hac vice*, is an enemy."[54] It follows that "for the purpose of capture, property found in enemy territory is enemy property, without regard to the status of the owner."[55]

From this flows the duty of the loyal citizen to remove his assets from the hostile country as soon as possible, and delay puts him in the same state as an enemy. If such property, so left in the foe's domain, should be captured by our forces, no right of *jus postliminii* can require its delivery to the original owner. Once impressed with the national character of the enemy nation, its subsequent capture by our forces does not change its status.[56] Nor is there any way to avoid this result by any act of the citizen, for it is equally unlawful for him, after war has started, to send a vessel to the enemy country to bring away his property.[57] Statutes alone can relieve such hardships, and our own history has furnished good examples of them.

In the War of 1812 Congress gave a six months' period of grace within which the President could allow safe conducts for the removal of property of British subjects within the United States.[58] The Civil War,

[54] Prize Cases, 2 Black 635. "While he may not have committed a crime for which he can personally be punished, his offending property may be treated by the average belligerent as enemy property. He has the legal right to carry, to sell and to buy; but the conquering belligerent has a corresponding right to capture and condemn. He enters into a race of diligence with his adversary, and takes the chances of success. The rights of the two are in law equal. The one may hold if he can, and the other seize," Young *v.* U. S., 97 U. S. 39.

[55] Lamar *v.* Brown, 92 U. S. 187.

[56] *The William Bagaley*, 5 Wall. 377.

[57] *The Rapid*, 8 Cr. 154.

[58] Act July 6, 1812, c. 129; see dissenting opinion of Story, J., in Brown *v.* U. S., 8 Cr. 110, 148.

however, furnished an even better example in the Abandoned and Captured Property Act of March 12, 1863.[59] This statute required that all property, captured or found abandoned in the various States composing the Confederacy, be turned over to the Treasury Department, which should sell the same and hold the proceeds subject to suits therefor to be prosecuted in the Court of Claims by the true owners, such suits to be brought within two years after the close of the war. But it was provided that no owner could maintain such a suit unless he had been loyal, and had never given aid or comfort to the Confederacy.[60] This statute was open to all who were not within the prohibited class, neutrals as well as those loyal to the North.[61] But the neutral, in order to recover, must show that his property, whose proceeds constituted the subject of his suit, was not, of itself, giving "aid and comfort" to the enemy. A nonresident alien could not very well commit treason, because a breach of allegiance is of the essence of treason. But if the property had been used, in aid of the Confederacy's military or other governmental operations, as in running a blockade, then *pro tanto*, its owner had been giving aid and comfort to the Confederacy and could not recover.[62] To the native born, indeed, a Presidential pardon operated as a complete substitute for proof that the claimant gave no aid or comfort to the enemy,[63] but the historic Christmas Day procla-

[59] 12 Stat. 820, 821. Now found in Jud. Code 1911, Sects. 162, 150–152.
[60] See a summary of the statute in *Mrs. Alexander's Cotton*, 2 Wall. 404.
[61] U. S. *v.* O'Keefe, 11 Wall. 178; Carlisle *v.* U. S., 16 Wall. 147.
[62] Young *v.* U. S., 97 U. S. 39.
[63] U. S. *v.* Padelford, 9 Wall. 531.

mation of amnesty[64] was strictly a family affair, and had no application to offending neutrals.[65]

To the enemy who comes to us with arms in his hands, or who, having borne arms, is sent back to us as a prisoner of war, the common law has no application. Beyond the peace of the state he completely is, being subject only to the laws of war. Breaches of those laws are punishable by the statutory court martial sitting under the Articles of War. To that tribunal alone is confided, by the custom of war, jurisdiction over all matters affecting the prisoner of war. The latter has no right even collaterally to review its proceedings in the common law courts. If he should apply for a writ of habeas corpus, it would be dismissed at the hearing on the determination that he is not a citizen and is held as subject to martial law;[66] and, indeed, the judge to whom he applies can safely refuse the writ if he can show, for his own protection, that the applicant is within this outlawed class.[67]

A slightly different question arises when the captured enemy turns out to be a traitor in arms. To which jurisdiction is it committed to try him for treason, he being thus apprehended in arms? When Perkin Warbeck was thus taken, having landed on English soil with armed forces bent on the dethronement of Henry VII, it was decided that the court martial had exclusive jurisdiction.[68] But Warbeck was an alien, and his case, as regards a disloyal citizen, would not be sound authority;

[64] December 25, 1868, 15 Stat. 711.
[66] Young *v.* U. . (*supra*).
[66] Rex *v.* Vine Street Police Station, 113 L. T. 971.
[67] *Case of the Three Spanish Sailors* (2 W. Bl. 1324).
[68] *Vide* 7 Co. Rep. 6 b.

and on this distinction alone may hang, for purposes of authority, the more or less celebrated case of Wolfe Tone.

During the Irish Rebellion of 1798, Wolfe Tone was captured in Ireland, wearing the uniform of a French officer, having indeed but recently been landed from a French warship. The prisoner was put on trial before a court martial in Dublin, convicted, and sentenced to execution; but his counsel, the eloquent Curran, appeared before the Irish King's Bench, and applied for a writ of habeas corpus on the morning of the day set for the execution. It was granted, and the court, according to the reporter, waited in a state of utmost agitation for its return. The jailor refused to deliver the prisoner, but before the court could put further measures into effect, the announcement was made that the prisoner had committed suicide. The entire proceeding was *ex parte;* counsel for the army was never heard, and the only "decision" lay in the action of the court in granting the writ on application of the prisoner's counsel.[69]

The dramatic instinct of the editors of the state trial series bade them put this *ex parte* application into reports of what, in the main, are adjudged cases. It is no wonder that it has been most infrequently cited; no practising counsel would presume to cite, as a precedent in the law, any proceeding in which both sides were not heard. Especially is this so where the *ex parte* application is for a writ of habeas corpus; the real hearing is had, and the decision rendered, on the return of the writ. But, far more remarkable than the fact that this

[69] *Wolfe Tone's Case,* 27 How. St. Tr. 614.

case appears in Howard's State Trials, is the prominence that Professor Dicey gives it,[70] and, that too for a proposition which it does not decide. Professor Dicey considers this case as holding that there can be no state of martial law so long as the civil courts are open. If the case decides anything, it is not that point. All it decides is that a traitor caught in the enemy's uniform, bearing arms against his country, is not, by reason of that fact alone, subject to the jurisdiction of a court martial; which is quite a different proposition. It is, therefore, no wonder that in none of the later cases involving the proposition in which Professor Dicey is interested, such as *Exp.* Milligan, *Exp.* Marais, Luther *v.* Borden and Moyer *v.* Peabody,[71] is Wolfe Tone's Case even mentioned, much less discussed. But for the point which it did decide, it seems to have received respect even in England, if we may judge by the fact that Sir Roger Casement, who landed on the Irish coast from a German submarine, was given his trial in a common law court. Wolfe Tone's Case, then, leaves us that one point, that a traitor in arms is still within the benefits of the common law while the alien enemy is not.

Outside of the question as to jurisdiction over armed traitors, the dealings between our army and that of the enemy are wholly beyond the pale of the common law. The rules of warfare, of truces, of bombardments and the like, are wholly matters of customary military law, as modified by international conventions. Violations of these rules constitute "war crimes" punishable in our

[70] Dicey Law of the Constitution, 8th ed., ch. 8.
[71] All discussed *infra*.

military courts.[72] One of the most famous instances in our history, of the exercise of this jurisdiction is to be found in the case of Major André. Major André, briefly to repeat what is with us a twice-told tale, was a commissioned officer of the British Army during our Revolutionary war. In plain clothes, he came within our lines to negotiate with the traitorous Arnold, commanding our strong place of West Point, for the delivery of that fortress to the British commander. Returning from this mission, Major André was apprehended near Tarrytown, and delivered to General Washington. He was brought to trial at Tappan before a military commission or "board of general officers," composed of six major generals, and eight brigadiers, convened by order of the commander in chief. He was convicted of the charge of espionage and sentenced to be hanged; and the sentence was duly executed.[73] Protest regarding this judgment has been confined to English civilians, as distinct from military men.

Obviously such matters are not actionable civilly. Civil litigation between enemy combatants is impossible in our courts, because the foreign alien enemy cannot sue one of our citizens. Nor could any such suit be

[72] 2 Oppenheim, International Law, 2d ed., 309 sq. "He was responsible for his conduct to the laws of his own government only as enforced by the commander of its army in that State, without whose consent he could not even go beyond its lines. Had he been caught by the forces of the enemy, after committing the offense, he might have been subjected to a summary trial and punishment by order of their commander; and there would have been no just ground of complaint, for the marauder and the assassin are not protected by any usages of civilized warfare. But the courts of the State, whose regular government was superseded, and whose laws were tolerated from motives of convenience, were without jurisdiction to deal with him." Coleman *v.* Tenn., 97 U. S. 509.

[73] 2 Chandler's Criminal Cases, 167.

brought after the war, based on an alleged breach of the laws of war governing the conduct of hostilities, because, though such acts may constitute harms, they certainly have not that essential element of the actionable tort, that the plaintiff, when injured, was in the peace of the State.

The dealings between our army and the civilian inhabitants of occupied enemy territory are matters reserved for the next chapter. It remains then to notice the alien enemy who chooses to dwell within this country.

With him, in the first instance, the army has nothing to do. This sort of enemy occupies, under our law, a most interesting position. At any moment the Executive, acting, however, not through the army but through the United States marshal, who, in the Federal jurisdiction, exercises functions similar to those of the sheriff, may intern him, provided only that he has exceeded the age of fourteen. To this end the President is empowered by a statute of over a century's standing.[74] Any alien, not chargeable with actual hostility or other crime against public safety, is allowed, for departure and removal of his assets, a time fixed by treaty, or if no treaty, such reasonable time as the President may declare by proclamation. After such proclamation, any alien enemy who is at large, contrary to the proclamation and a menace to our peace and safety, may be brought before a Federal court or judge, who, after hearing, may order his removal, his bond for good behavior, or restraint, according to the proclamation.

[74] Act July 6, 1798, c. 66, R. S., Sects. 4067–4070; Comp. Stat. 1913, Sects. 7615–7618. Supplemented by Act of April 19, 1918, relating to registration of alien enemy women.

Such orders are executed by the marshals. Having this power of internment—a power in whose exercise the Presidential decision is not subject to judicial review,[75] it follows that the incidental power of regulating the movements of aliens, etc., is included.

But until internment occurs the resident civilian enemy remains in the bourne of the common law. If he is here, say our courts, he is here by permission, and until his permit is revoked, as to person or property, he rests in the full protection of the law. As to person, an order of internment will end the matter. As to property, affirmative action of the legislature is necessary before the common law will sanction any adverse claim resting on the question of his status. Whatever may once have been the practice of the government confiscating his assets with the outbreak of war, giving him back at the conclusion of peace what might remain on hand,[76] our Supreme Court has made it clear that the declaration of war does not of itself sanction confiscation proceedings, but that it "vests only a right, the assertion of which depends on the will of the sovereign power."[77] But the court did not deny the existence of the right; on the contrary, the most it would urge, as a matter, really, of international law, was "that tangible property belonging to an enemy and found in the country at the commencement of the war, ought not to be immediately confiscated."[78] And carefully did the court except questions of maritime prize; the property in

[75] Graber's Case, 247 Fed. 882. See also Martin *v.* Mott, 12 Wheat. 19.

[76] See Antoine *v.* Morehead, 6 Taunt. 238; Porter *v.* Freudenberg, 1915, 1 K. B. 857.

[77] Brown *v.* U. S., 8 Cr. 110.

[78] Brown *v.* U. S., *supra.*

question being timber on land, belonging to the enemy alien, and in nowise a subject of admiralty or prize court jurisdiction. No difficulties in this connection can arise during the present war. The Trading with the Enemy Act of October 6, 1917, takes care of the situation by vesting title to the local property of enemy aliens in an official custodian. Thus, so far from confiscating enemy property, our government conserves it for the enemy's benefit; but this temporary sequestration is also a wholesome measure for our own protection.

With the enemy alien thus living in the day-to-day peace of the State, the army has nought to do. If his internment is desired, the marshal is the officer for that function, and at and with his internment, the alien enemy's assets, so far as they may be located in this country, pass into the hands of the custodian acting under the Trading with the Enemy Act. It is only when this alien enemy, while still at large, lurks as a spy near one of our forts, reservations, etc., that he can put himself within the military jurisdiction. Then, like any other offender coming within the description of the Eighty-second Article of War of which we have treated in Chapter III, he is subject to trial by a court martial as a spy. So far, and no further, go the express words of the statute law. But it is submitted that statute law is not, on this point, entirely exclusive of the laws of war which have force with regard to the enemy, wherever he may be. The statute covers one class of acts of war, which the enemy alien, residing among us, is capable of committing; and recent legislation relating to espionage, sabotage and sedition, bring others within the

criminal jurisdiction of the Federal Courts.[79] But if the resident alien enemy's activities, in the way of acts of war, should conceivably take a shape not fitting any statutory description, it is believed that such an offense would be justiceable by a military court.[80] If the present Articles of War are not broad enough to include such acts within the jurisdiction of courts martial, no constitutional objection would lie to appropriate legislation in that regard.[81]

[79] Espionage Act of June 15, 1917, 40 Stat. 217; Sabotage Act of April 20, 1918; Sedition Act of May 21, 1918.

[80] See opinion of Speed, Attorney General, relating to the jurisdiction of the military commission which tried the Lincoln conspirators, 11 Ops. A–G. 297.

[81] See De Lacey *v.* U. S. 249 Fed. 625, and authorities there cited.

VI

MILITARY OCCUPATION IN MATTERS OF GOVERNMENT

In the last chapter we considered the position, at common law, of the enemy when within our gates, and the law with respect to the alien enemy so placed. Necessarily we were forced to treat somewhat of the loyal citizen's rights and obligations, as well as those of the loyal soldier. We now deal with the enemy when met abroad, within his own country.[1]

In such a connection we need consider only the rights and obligations of our army and its commanders. For reasons we have already examined, no civilian of ours can have any rights enforceable within the scope of our common law. Our civilian cannot trade or correspond with the enemy abroad, and, if one of our citizens chooses to live in the enemy country, or leave property there, he is, *quoad hoc*, an enemy himself, and in the same class with the enemy so far as the common law view is concerned. The civilian, therefore, as such, has no place in the enemy country, unless he goes there with a license permitting him to trade with the enemy, as in Mitchell *v.* Harmony.[2] Outside that limited class we need only consider the army, and its entourage as prescribed by the Articles of War.

[1] For matters treated in this and the subsequent chapter, the reader is referred to Moore's International Law Digest, Sect. 1143 sq.

[2] 13 How. 115, discussed *supra*.

All members of this organization, as we have already seen, are subject to the jurisdiction of courts martial, administering the body of military law, codified and uncodified, which is applicable to the soldier. While the army is at home, as we have seen, the criminal courts have a certain concurrent jurisdiction. But the jurisdiction of the court martial becomes exclusive the instant the army leaves our national boundaries. While marching through a friendly country, or stationed in it our army is to be treated as absolutely "exempt from the civil or criminal jurisdiction of the place."[3] The consent of the friendly government to such a proposition is assumed as a matter of course; indeed, were it to act otherwise, the consequences would be grave.[4]

Such being the case with a friendly ally, it follows *a fortiori*, as the Supreme Court says in the case last

[3] Coleman *v.* Tennessee, 97 U. S. 509, *The Exchange*, 7 Cr. 139, Dow *v.* Johnson, 100 U. S. 158.

[4] "It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. The sovereign is understood, said this court in the celebrated case of *The Exchange* (*supra*) to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions. In such a case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military forces of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require." Coleman *v.* Tennessee; (*supra*). The Act of April 18, 1918, authorizes the War Department to audit and settle all claims, made by inhabitants of France or our other allies, for damages caused by our troops.

cited, that our army, when within the enemy's country, is wholly exempt, in every respect, from the jurisdiction of his courts. "The fact that war is waged between two countries," says the Supreme Court, "negatives the possibility of jurisdiction being exercised by the tribunals of the one country over persons engaged in the military service of the other for offenses committed while in such service. Aside from this want of jurisdiction, there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded."[5]

If, then, a criminal court in the enemy country should, during the war, or after it, be asked to countenance the prosecution of an offense committed by a soldier of our army while the latter was within the enemy country, the common law view of the matter is that the court, being wholly without jurisdiction, should refuse to act. That was the decision in Coleman *v.* Tennessee.[6] The appellant, a soldier of the United States forces, in hostile occupation of Tennessee during the Civil War, was tried by court martial for murder, and acquitted. The war ending, and Tennessee being restored as a State of the Union, the appellant was indicted in a court of that State for the same murder. He pleaded, in bar, his former acquittal by the court martial. If Tennessee had not been, at the time of the court martial, enemy territory, that plea should have been sufficient.[7] But the Tennessee court held the plea bad even as a plea of *autre fois acquit*, and the appellant was then convicted.

[5] Coleman *v.* Tennessee (*supra*).

[6] *Supra.*

[7] Grafton *v.* U. S., 206 U. S. 333, 27 Sup. Ct. Rep. 749, discussed *supra*, Ch. IV.

The Supreme Court held that the plea should not have been *autre fois acquit*, for that implied a concurrent jurisdiction in the Tennessee court, whereas really, Tennessee having been then enemy country, its courts had no jurisdiction at all of any military offense; the court martial's jurisdiction being exclusive. The court, however, treated the plea as though it had properly stated this contention, and reversed the state court's judgment accordingly.

There is, however, in such a state of affairs, one tribunal of the enemy that can be said to have concurrent jurisdiction. If the culprit's act constitutes a "war crime" of the sort previously mentioned, then, should he be taken prisoner by the enemy's army, the latter's commander could put him to trial before a court martial of the enemy's own choosing.[8]

So much, then, for criminal jurisdiction over the soldier when in the enemy's country; it is exclusively vested in the court martial. Criminal laws of the enemy State, to continue with the Supreme Court's language, "are continued in force only for the protection and benefit of its own people. As respects them, the same acts which constituted offenses before the military occupation constitute offenses afterwards; and the same tribunals, unless superseded by order of the military commanders, continue to exercise their ordinary jurisdiction."[9]

As the invading soldier remains under the exclusive jurisdiction of the court martial as to criminal offenses, the same rule, by the very reason of the thing, would

[8] *Supra*, Ch. V.

[9] Coleman *v.* Tennessee (*supra*).

apply to his torts or even his matters of contract. Clearly our soldier is not answerable civilly to a local provisional court, because he has not come within the sanction of the enemy nation's municipal law. That law is "not for the protection or control of the army, or its officers or soldiers. These remain subject to the laws of war, and are responsible for their conduct only to their own government, and the tribunals by which those laws are administered. If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. They are amenable to no other tribunal, except that of public opinion, which, it is to be hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression."[10]

In Dow *v.* Johnson, from which quotation has just been made, the defendant, in command of forces operating within the occupied portions of Louisiana during the Civil War, seized for the use of his force certain supplies belonging to the plaintiff. For this the plaintiff sued in the provisional court in New Orleans (of which more hereafter), and recovered judgment by default. After the war the plaintiff sued the defendant, on this judgment, in the Federal court sitting in Maine. The Supreme Court held that a plea of *nul tiel record* was good because the provisional court had no jurisdiction. The court declared that "when our armies marched into the country which acknowledged the authority of the Confederate Government, that is, into the enemy's country, their officers and soldiers were not subject to

[10] Dow *v.* Johnson (*supra*).

its laws, nor amenable to its tribunals for their acts. They were subject only to their own government, and only by its laws, administered by its authority, could they be called to account."

Nor, as a general proposition, has any enemy a right of action, enforceable in our own courts,[11] or in any other courts ordinarily having jurisdiction.[12] If anybody could be considered as liable for the tort, it is the United States Government, not the military government of the occupied territory,[13] and for such a tort no petition will lie either in the Court of Claims or, under the Tucker Act, in the District Court.[14] The reason is simple. When our army operates in the enemy country, every act is an act of war, against one not in the peace of our State. No member of the forces can conceivably be liable in our courts for an act, committed in the flagrancy of war, and done to one who, at the time of the offense, had no right of action in our courts. To say that, with the conclusion of peace, the injured enemy may sue in our courts, is to create an actionable tort *ex post facto;* and that, too, as of a time when it would have been against public policy even to have suggested that an action lay. This the common law courts will not do. When an act is done *"flagrante*, yet *non dum cessante bello*," to paraphrase the words of Lord Tenterden, speaking for the Privy Council, "the municipal court has no jurisdiction

[11] Lamar *v.* Brown, 92 U. S. 187; Coolidge *v.* Guthrie, Fed. Case 3186.

[12] Ford *v.* Surget, 97 U. S. 594; Elphinstone *v.* Bedeechrund, 1 Knapp P. C. 316.

[13] Wallace *v.* Alford, 39 Ga. 609; O'Reilly *v.* Brooke, 209 U. S. 45, 28 Sup. Ct. Rep. 439.

[14] Ribas y Hijo *v.* U. S., 194 U. S. 310; 24 Sup. Ct. 727; Herrara *v.* U. S., 222 U. S. 558, 32 Sup. Ct. Rep. 179.

to adjudge upon the subject, but if anything was done amiss, resort could only be had to the Government for redress."[15] Adopting these words, our Supreme Court describes the United States Government as the only source to which the plaintiff can look for redress, for violation of the laws of war; and that as a matter of grace, not right. In Lamar *v.* Brown [16] the plaintiff, after the close of the Civil War, sued the defendant in the Federal Court, sitting in Massachusetts, for the conversion of cotton. The defendant showed that he, as a government agent, seized this cotton in a Southern State under military occupation, under color of the Captured and Abandoned Property Act. The Supreme Court held this defense sufficient, because (*a*) being found in enemy territory, the cotton was enemy property, for reasons heretofore discussed, and (*b*) the cotton was a legitimate subject of capture, for reasons hereafter assigned. In Ford *v.* Surget [17] the same beneficent rule was applied in behalf of a Confederate officer who had burned cotton belonging to the plaintiff, the latter being a resident of, and a sympathizer with, the Confederacy. The destruction of the cotton, said the Court, "under the orders of the Confederate military authorities, for the purpose of preventing it from falling into the hands of the Federal army, was, under the circumstances alleged in the special pleas, an act of war upon the part of the military forces of the rebellion, for which the person executing such orders was relieved from civil responsibility at the suit of the owner voluntarily resid-

[15] Elphinstone *v.* Bedeechrund (*supra*).
[16] *Supra.*
[17] *Supra.*

ing at the time within the lines of the insurrection." And in Elphinstone *v.* Bedeechrund [18] the plaintiff's property had been seized under the defendant's order; the defendant mistakenly supposing it to be the property of the hostile sovereign or public moneys. No active hostilities were then being carried on in the immediate neighborhood of the seizure, though the war was not at an end. The Privy Council held that this was an act of war, within the protection of the rule we have mentioned, and that the defendant was not liable.

It is different in the case of controversies between enemy subjects. They are not bound to resort to the military courts of the conqueror; on the contrary, their original courts usually remain open for all ordinary civil business, and, within limits of the nature above and hereafter outlined, for criminal business as well. But even this is entirely at the will of the commander. What does that mean?

Military government, of which we are now to speak, is a thing familiar to our courts. In the Mexican War, not merely were parts of Mexico occupied by our forces, but the territory afterwards ceded to us was first subject to our armed occupation. From a strategic point of view the history of our Civil War was one of slow constriction of the South; from a legal point of view it was a broadening drama of military occupation, successive governments being established as the Confederacy gave ground. The Confederates, on the other hand, established but one military government, in Arizona,[19] Lee's occupation of southern Pennsylvania producing no such result.

[18] *Supra.*

[19] Birkhimer, Military Government and Martial Law, p. 93.

Military occupation means, in this connection, several things.

First: The very fact of the occupation severs the political relation between the people of the hostile country and the former sovereign,[20] and the inhabitants owe the commander the duty of obeying his regulations and none other. This, however, does not effect a change of allegiance. The commander has no right to require the inhabitants to take an oath of allegiance; at best he can only ask for an oath of obedience to his orders. That was the mistake made by General Pope in the Civil War, when he included, among his famous orders, a requirement that all inhabitants of the occupied districts must either take an oath of allegiance or depart to the enemy lines. The trouble with such an order was that it confounded military occupation with annexation.[21]

[20] Coleman *v.* Tennessee (*supra*); Dow *v.* Johnson (*supra*).

[21] "There was still another order . . . This provided that the oath of allegiance should be tendered to all male citizens in the lines of the army; that those who, after having taken it, violated it, should be shot, and that those who refused to take it should be sent beyond the lines of the army, with the threat of being treated as spies if they returned to their homes. For this order, it must be conceded, there is absolutely no justification. A commander in the field has nothing to do with allegiance, or oaths of allegiance, in his treatment of the enemy. He can only apply to them the well-recognized laws of war as explained above, namely, that all combatants belonging to the organized forces of the enemy shall be treated as prisoners of war, and shall be entitled to the immunities and respect shown to prisoners of war, and that all private warfare shall be repressed by the use of as much severity as may be found necessary to suppress it—but that is all. No one ever heard of the Germans tendering to the French villagers the oath of allegiance to the king of Prussia; and the only controversy on this subject of any consequence, in the late Franco-Prussian war, was caused by the doubt whether the francs-tireurs were, or were not, such a part of the organized military forces of France as to be entitled to the treatment, when captured, of prisoners of war. General Pope's authority on this subject was not enlarged in the slightest degree by the opinion which he entertained, or which his government entertained, that the enemy with whom he was fighting was in rebellion against the United States. He was not there as a United States

Never should that mistake be made. A country remains foreign soil to us, although completely within our military control. To make that soil ours, within the purview of our constitution and laws, it must be ceded to us; nought else will suffice. Cuba, though completely under our military control, was never a part of our domain,[22] and Porto Rico, only when ceded to us, ceased to be a foreign country.[23]

Nevertheless, the enemy subject does owe the duty of obedience above mentioned. The rationale of this duty may be the subject of dispute; but that the commander has the right to enforce such obedience cannot be denied.[24] "The right to govern the territory of the enemy during its military occupation is one of the incidents of war, being a consequence of its acquisition," says our Supreme Court,[25] and the English authorities are to the same effect.[26]

marshal, acting under the orders of a court, and arresting persons against whom a grand jury had found indictments for treason; but he was there as an officer of the army in the field, against an enemy in arms and entitled to be treated in all respects as a foreign foe." Ropes, The Army Under Pope, pp. 9–11. See also Spaight, War Rights on Land, p. 332. See also, as to one of General Hunter's proclamations, which President Lincoln rescinded, Burgess, The Civil War and the Constitution, Vol. 2, pp. 82–83.

[22] Neely *v.* Henckel, 180 U. S. 120, 21 Sup. Ct. Rep. 302.

[23] De Lima *v.* Bidwell, 182 U. S. 194; 21 Sup. Ct. Rep. 743. In Fleming *v.* Page, 9 How. 603, is a dictum that mere conquest gives title. If Cross *v.* Harrison, 16 How. 164, did not overrule this dictum, as the court later said it did, De Lima *v.* Bidwell, *supra*, the case of De Lima *v.* Bidwell certainly had that effect.

[24] See Bordwell, Laws of War, 300; Oppenheim, Legal Relation between Occupying Power and Inhabitants, 33 Law Quarterly Review 363. Discussion of the nature of this "war allegiance" and the resulting crime of "war rebellion," punishable by the commander, gets nowhere, and frequently ends in the realm of nominalism (See Birkhimer, *op. cit.* 69). The fact is that this temporary allegiance is a part of the laws of war, and breaches of it are, therefore, punishable by the military authority.

[25] Coleman *v.* Tenn. (*supra*).

[26] "When his Majesty's forces are in armed occupation of hostile territory,

Second: The Executive, as Commander-in-Chief, can form a temporary civil government for the occupied territory, to operate under the direction of the military commander. To support such a government taxes can be collected from the inhabitants, and tariff duties imposed upon imports. All such directions are valid until Congress sees fit to supersede them; wherefore one who has paid taxes to such a government, although under protest, cannot maintain an action to recover them back. Such was the holding in Cross *v.* Harrison [27] as to customs duties paid to the provisional government of California, and to the same effect is Fleming *v.* Page [28] relating to the provisional government of Tampico.

With the cessation of the military occupation this government of necessity ends. Such interesting questions as might otherwise arise in connection with outstanding contracts and obligations of the provisional government are usually settled by treaty, when the war is between independent States. The common law so far has not spoken on the subject, for we do not consider New Orleans *v.* Steamship Co.[29] as an actual pronouncement. There the military government, ruling the occupied city of New Orleans, leased certain water front property, which belonged to the City, for a ten-year term. A year later the control of the City was handed back to the city authorities. They tried to repudiate the lease, but the decision which the court rendered, up-

it is competent to H. M.'s commanders to declare that martial law shall prevail in such territory, and to lay down rules which they deem essential for the preservation of H. M.'s forces and military stores," 9 Halsbury's Laws of England, 104 citing opinions of Crown Law Officers.

[27] Cross *v.* Harrison, 16 How. 164.

[28] *Supra.*

[29] 20 Wall. 387.

holding the lease, is not of much help. The City undoubtedly could elect to adopt the lease, and thus succeed to all the former government rights under the contract; and its election to do this was shown in the fact that it had collected one installment of rent prior to its attempted repudiation of the lease. Hunt, J., rests his special concurring opinion on this ground alone; but the majority opinion, while admitting "the general principle that the contracts of the conqueror touching things in conquered territory lose their efficacy when his dominion ceases," yet considered that the peculiar necessities of the City at the time this lease was made, gave implied authority to the military government to bind itself and all future governments for a period of years. This is especially hard to understand when we recall that the Supreme Court has placed itself clearly on record as repudiating any doctrine, of the *postliminii* variety, that conquest alone can give title.[30]

Third: The military, as to all controversies with civilians, are subject only to the jurisdiction of their own court martial, as we have seen. But it is customary to leave the courts of the country in operation for all civil litigation between the inhabitants, and, for their governance, to leave the municipal laws of the country in force. In fact, the commander's affirmative action is required to change the municipal law; until he acts, it is presumed that he intends to leave it of full force.[31]

[30] De Lima *v.* Bidwell (*supra*); Am. Ins. Co. *v.* Canter, 1 Pet. 542. The dictum in the direction of the doctrine of conquest, found in Fleming *v.* Page, 9 How. 603, must be considered as overruled. See De Lima *v.* Bidwell (*supra*).

[31] Wingfield *v.* Crosby, 5 Cold. Tenn. 246. "By such occupation the political relations between the people of the hostile country and their former government or sovereign are for the time severed; but the municipal laws—

Sometimes the military authorities may set up, in the place of an old local court, a new and provisional court with the same jurisdiction. Such was the course followed after the Federal forces completed their military hold upon New Orleans, the greatest commercial city of the Confederacy.

Such courts can only exercise the jurisdiction thus allowed them. The commander may reserve for his own jurisdiction, exercised through a provost court, any cases he may choose, and his directions must be obeyed. Likewise he may determine to try offenses savoring of war treason before a military commission of his own selection.

Neither a provost court, as above mentioned, nor a court for the trial of war treasons, is a court martial in the sense wherein we have previously used that term; because the court martial which deals with the crimes of the soldier is statutory, whereas courts of the class now under discussion derive no authority from our statute law. But these various courts are all alike in the respect, that the sentence of each requires the confirmation of the appointing power before it can be effective as a judgment; the court, in short, is an advisory committee, to advise the commander as to the facts, and likewise inform his conscience as to the punishment. But there is this difference, that the offend-

that is, the laws which regulate private rights, enforce contracts, punish crime, and regulate the transfer of property—remain in full force, so far as they affect the inhabitants of the country among themselves, unless suspended or superseded by the conqueror. And the tribunals by which the laws are enforced continue as before, unless thus changed. In other words, the municipal laws of the State, and their administration, remain in full force so far as the inhabitants of the country are concerned, unless changed by the occupying belligerent. Halleck, Int. Law, c. 33." Coleman *v.* Tennessee, *supra*.

ing soldier has the statutory right, under the Articles of War, to a trial by court martial rather than by the commander, whereas, in a case of war treason, the offender has no right to trial by a military commission rather than by the commander. The commander could try the case himself, if he chose; therefore, the court he creates is wholly legatory. The term military commission, first applied to such a court by General Scott in the Vera Cruz campaign,[32] was scientifically correct, and it has continued, in our courts' recognition, as well as army practice, to the present day.[33] The practice of such a court is governed, as near as may be, by that of courts martial; and its jurisdiction is just as exclusive.

If, then, the commander chooses to send a certain criminal case to the military court, the civil court cannot release the prisoners by way of *habeas corpus*. Such was the holding in the courts of Mississippi, during the Reconstruction period, while that State, according to the theory finally adopted,[34] was under military control.[35]

The judgments of such a court, in all cases whereof it has jurisdiction, are entitled to receive from our courts

[32] See Birkhimer, *op. cit.* appendix, for Scott's proclamation featuring the above; also the arguments in *Ex parte* Milligan, 4 Wall. 2.

[33] See *Ex parte* Vallandigham, 1 Wall. 293.

[34] Prior to that question being settled, Nelson, J., sitting in New York, discharged from the Albany penitentiary a prisoner sent there under the judgment of a Military Commission sitting in South Carolina in September, 1865; his reasoning being that military control ceases with the termination of actual hostilities. *Re* Egan, 5 Blatch. 319; Fed. Case 4303.

[35] *Re* McArdle, 2 Am. Law Review 355; *Ex parte* Hewitt, 3 Am. Law Review 382. A record of the trial of the Columbus Prisoners, before a Military Commission held in Atlanta in 1868, is among the writer's most valued possessions. Mr. Jefferson Davis, on the contrary, was, by Executive Order, turned over to the civil court (the United States District Court, sitting at Richmond) for trial on an indictment for treason. See U. S. *v.* Davis, Chase's Dec. 1; Blackford, The Trials and Trial of Jefferson Davis, 54–55.

the same measure of faith and credit as would be due the judgment of the court of any foreign country. In Dow *v.* Johnson [36] the judgment of the New Orleans provisional court was given no effect because, for reasons already detailed, it lacked jurisdiction of the subject matter; but in all cases not involving such a question as that presented by Dow *v.* Johnson, full faith and credit was given to the judgments of these courts, not merely by other courts on collateral attack, but by the succeeding regular courts of the States in which such judgments had been rendered.[37] Indeed, long prior to the Civil War, the validity of the judgments of such courts had been upheld in Leitensdorfer *v.* Webb;[38] the provisional court there involved having been established in territory occupied by our forces during the Mexican War.

Fourth: These concessions are but concessions; and in the end the power of the commander is supreme. Concessions granted may be withdrawn; they need not be granted in the first place. As stated both by Lord Halsbury [39] and by Oppenheim,[40] the law administered, by whatever pattern the commander may choose to model it, is martial law. In Napoleon's words, "the laws of war confer on the Commander *la grande police* over the country which is the theatre of war."[41] "The question here," says the Supreme Court, "is, what

[36] *Supra.*

[37] *The Grapeshot*, 9 Wall. 129; Pennywit *v.* Eaton, 15 Wall. 382; Handlin *v.* Wickliffe, 12 Wall. 173; Pepin *v.* Lachenmeyer, 45 N. Y. 27; Hefferman *v.* Porter, 6 Cold. Tenn. 391.

[38] 20 How. 186.

[39] Halsbury's Laws of England, *supra.*

[40] *Supra.*

[41] Picard, Preceptes et jugements de Napoleon, 97.

is the law which governs an army invading an enemy's country. It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and in time of peace, is essential to the preservation of liberty."[42] And when, from one point of view, we ask for a definition of this sort of martial law, the oft-quoted definition given by Wellington is as good as any. "Martial law," said the Duke, "is the will of the commanding officer of an armed force or of a geographical military department, expressed in time of war, within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military or supreme executive chief."[43]

Nevertheless, the enforcement of martial law is hedged about with requirements of a sort no civilized conqueror can ignore. "The commander of any city where martial law[44] prevails," says the greatest conqueror Europe has seen since Caesar, "is, after all, a magistrate, and he should conduct himself with such moderation and decency as circumstances will permit."[45] While the soldiers in occupation are answerable only to court martial, yet they are also answerable, says our Supreme Court, to the tribunal of public opinion, "which, it is to be hoped, will always brand with infamy

[42] Dow *v.* Johnson (*supra*).

[43] See 14 Hansard, Parl. Deb. 3d Series, 879; 8 Op. At. Gen. 366.

[44] *État de siège.*

[45] Picard, *op. cit.* 101.

all who authorize or sanction acts of cruelty and oppression."[46] Thus, while it is for the commander to prescribe the extent to which the local courts shall exercise jurisdiction, our Supreme Court got a chance, in the instance of a State under reconstruction, to decide that a commander could not arbitrarily upset the judgment rendered in a case of which he had allowed the local court to take jurisdiction.[47]

It must be noted, in view of matters treated in the ensuing chapter, that the government of the State in question, though military, yet derived its powers from acts of Congress. That circumstance, and that alone, allowed a common law decision on matters over which, as we see, the common law ordinarily has no jurisdiction. But, whenever it can speak, thus speaks the common law; expressing what it conceives to be a principle of the laws of war, that, even in a conquered country, the commander's power, next to securing the welfare of the army and the stern repression of all forms of war treason, should work for just treatment of the civil population. The best evidence

[46] Dow *v.* Johnson (*supra*).

[47] "We have looked carefully through the acts of March 2, 1867, and July 19, 1867. They give very large governmental powers to the military commanders designated, within the States committed respectively to their jurisdiction; but we have found nothing to warrant the order here in question. It was not an order for mere delay. It did not prescribe that the proceeding should stop until credit and confidence were restored, and business should resume its wonted channels. It wholly annulled a decree in equity regularly made by a competent judicial officer in a plain case clearly within his jurisdiction, and where there was no pretense of any unfairness, of any purpose to wrong or oppress, or of any indirection whatsoever. . . It was an arbitrary stretch of authority, needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires," Raymond *v.* Thomas, 91 U. S. 712.

that the common law has correctly measured the rules which it thus adopted, is to be found in the professions of our enemy, made in connection with his occupation of Belgium and of Northern France. As to his actual practices, mankind has already found the facts and rendered judgment. But scarcely a protestation uttered, or regulation issued, by the enemy, fails to conform strictly to the requirements hereinabove noted.[48]

To the credit of this country's arms, an occurrence of the kind described in Raymond *v.* Thomas[49] is very much of the exceptional. Military control of occupied territory is generally accompanied by friction, for high spirited people are chafed by the very sight of their conquerors. It was so during the occupation of our coast cities by the British during the Revolution;[50] it was so during the Reconstruction period through which the Southern States were compelled to pass after the close of the Civil War.[51] Yet the following tribute may well be quoted from a brochure of our own time, which certainly is not tinged with bias:

In investigating this whole subject it has been necessary to read many pages of the correspondence between the

[48] The reader is referred to the German Regulations for Belgium, edited by Huberich and Nicol-Speyer, published at the Hague in 1915; De Leval, Prussian Law as applied in Belgium, 42 Rep. Am. Bar Assn. 301; and the following from the *Times Current History:* German Civil Administration in Belgium, 5 T. C. H. 136; A Talk with Belgium's Governor, 2 T. C. H. 363; Under German Rule in France and Belgium, 6 T. C. H. pt. 1, 525; Whitlock's Report on Belgian Deportations, 6 T. C. H. Pt. 1, 543; Belgian Memorandum on the Same, 6 T. C. H. Pt. 2, 143; Gen. von Bissing's Controversy with Cardinal Mercier, 5 T. C. H. 478; Belgium's Protest on Monthly Tax of 4,000,000 francs, 3 T. C. H. 1113; Bryce Commission's Report, 2 T. C. H. 551; French Report, 2 T. C. H. 259.

[49] *Supra.*

[50] *e. g.*, see Jones, History of New York, Vol. 2, p. 186.

[51] See Reynolds, History of Reconstruction in South Carolina, 40 *et seq.*; Pendleton, Life of Alexander H. Stephens, 343 *et seq.*

commanding officers of the Federal armies and the civil departments, and especially between them and Judge Advocate General Holt, and it gives pleasure and speaks well for human nature, to note that whenever a gallant Union soldier had to deal with the matter of the treatment of a Confederate soldier or citizen, his tone was one of mercy, of justice, and of respect, without insult or harsh expression, and with the utmost consideration for the defenseless, the weak, and the unfortunate. Everyone knows this was characteristic of Grant, but the same may well be said of Sheridan, of Sherman, of Thomas and of many others.[52]

Well would it be for our present enemy could any honest soldier ever find it in his heart to say the same of all the German commanders who have controlled the lives and honor of the inhabitants of Belgium and Northern France! But humanity in treatment of the conquered is not merely a thing of the past with our army. Its record of constructive achievement justifies General Leonard Wood's description of it as "one of the great factors in the development of our country and of lands under our control." [53]

[52] Blackford, The Trials and Trial of Jefferson Davis, p. 39. The only exception noted is in the case of the officer to whose charge Mr. Davis was committed, and his behavior is ascribed to the tone of the instructions given him by the Secretary of War.

[53] Wood, Our Military History, 225.

VII

MILITARY OCCUPATION IN MATTERS OF PROPERTY

Since, as we have seen in the last chapter, the common law view is that conquest confers no state title to occupied regions, it naturally follows that no portion of enemy territory can pass to the conqueror. Private titles in land, therefore, remain unaffected by invasion. To real estate the conqueror may not acquire title, although its usufruct may be enjoyed; it is only personal property and choses in action—movables—that may constitute the subject matter of capture. Statutes of confiscation were necessary to affect the title to land, and no larger estate can pass under any such statute than the extent of the estate it prescribes.[1]

Such statutes were a feature of the Civil War on both sides.

The Confederate legislation is described in Dewing *v.* Perdicaries,[2] although the Supreme Court declined to recognize its validity, since that would have involved recognition of the Confederate government as existing *de jure*.

The first Federal statute was that of August 6, 1861,[3] which confiscated all property used in aid of the rebellion. The second was the Act of July 17, 1862[4]

[1] See Miller *v.* U. S., 11 Wall. 268.
[2] 96 U. S. 193.
[3] 12 Stat. 319.
[4] 12 Stat. 591.

which confiscated the property of certain classes of persons in the Confederacy, whether or not such property was being used in aid of the rebellion; but, in view of the constitutional provision that no attainder of treason shall work a forfeiture except during the life of the person attainted, a joint resolution [5] amended the statute so as to make the forfeiture only for the life of the person in question.[6] The third Federal statute was the Captured and Abandoned Property Act of March 12, 1863 [7] whose effect we have heretofore considered.

These statutes had varying effects. The Act of 1861, which confiscated property used in aid of the rebellion, was upheld as an exercise of the government's war powers. It was purely impersonal, and acted *in rem*, directly on the offending and hostile property, wherefore a condemnation sale under this statute would pass a fee simple title to the purchaser.[8] The Act of 1862, on the contrary, had a very different object—"not to make the property a lawful subject of capture and prize, as in the act of 1861, but to punish the owner for countenancing the rebellion. . . In this way the condemnation of real property under the act of 1862 was confined to the natural life of the offending owner; but nothing of the sort was done under the act of 1861, because that had reference only to the capture and condemnation of property for its unlawful use."[9] The Captured and Abandoned Property Act likewise had an impersonal nature. It swept into the treasury the proceeds of all

[5] 12 Stat. 627.
[6] See Miller *v.* U. S. (*supra*).
[7] 12 Stat. 821.
[8] Miller *v.* U. S. (*supra*); Kirk *v.* Lynd, 106 U. S. 315.
[9] Kirk *v.* Lynd, 106 U. S. 315, 319; U. S. *v.* Dunnington, 146 U. S. 338.

property which the Federal troops might pick up during their penetration into the south, leaving it to the owner to assert his claim, in the Court of Claims, on establishing his loyalty.

For all three Acts a pardon operated to purge the claimant of disloyalty [10] and, for the confiscation Act of 1861, no method of condemnation procedure was provided.

Now, while legislation of this sort is peculiar to civil war, and can form no precedent for a war between independent nations, two of these statutes, those of 1861 and 1863, serve as an introduction to the common law's view of capture. The operation of each statute is wholly *in rem*. It is not necessary that the owner of the property be named; the property itself is the defendant, and the owner appears on the record only as a claimant.[11] That accords precisely with the common law's view of capture of enemy property during the operations of war, as stated in two opinions of the Supreme Court.

Property captured during the war, said that court, "was not taken by way of punishment for the treason of the owner, any more than the life of a soldier slain in battle was taken to punish him. He was killed because engaged in war, and exposed to its dangers. So property was captured because it had become involved in the war, and its removal from the enemy was necessary in order to lessen their warlike power. It was not taken because of its ownership, but because of its character. But for the provisions of the Abandoned and Captured

[10] U. S. *v.* Padelford, 9 Wall. 531; U. S. *v.* Klein, 13 Wall. 128.
[11] Confiscation Cases, 20 Wall. 92.

Property Act, the title to and the proceeds of all captured property would have passed absolutely to the United States. By that act, however, the privilege of suing for the proceeds in the treasury was granted to such owners as could show they had not given aid or comfort to the rebellion."[12]

The power to declare war, which the Constitution confers upon Congress, carries with it "the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It, therefore, includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right. . . It is said the power to prosecute war is only a power to prosecute it according to the law of nations, and a power to make rules respecting captures is a power to make such rules only as are within the laws of nations. Whether this is so or not we do not care to inquire, for it is not necessary to the present case. It is sufficient that the right to confiscate the property of all public enemies is a conceded right."[13]

Captures by land and by water, however, have not been similar in their history. Our courts' jurisdiction of prize automatically comes into being with the outbreak of war. The Federal statute [14] confers upon the United States District Courts jurisdiction "of all prizes brought into the jurisdiction of the United States, and of all proceedings for the condemnation of property taken as prize." It is the same with England; the Probate,

[12] Young *v.* U. S., 97 U. S. 39.
[13] Miller *v.* U. S. (*supra*).
[14] Judicial Code (1911), Sect. 24.

Divorce and Admiralty Division having permanent jurisdiction in prize under the Navy Prize Act, 1864. Originally the machinery always needed an initial impulse, so with the outbreak of war the English Crown would issue a commission conferring prize jurisdiction on the Court of Admiralty. But whether automatically set in motion or not, the essence of the prize court's jurisdiction was always the same. It is well described, as the English Judges have lately had occasion to note, in the ancient form of commission, which required the Court "to proceed upon all and all manner of captures, seizures, prizes and reprisals, of all ships and goods that are, or shall be, taken; and to hear and determine, according to the course of the admiralty and the law of nations." [15] This jurisdiction was highly exclusive; so much so that, if captured property is adjudged not to be lawful prize, the captor cannot be sued at law for the trespass,[16] but the Prize Court can and will adjudge the damages that ought to be assessed to the claimant.[17] Yet, despite the international and exclusive aspects of its jurisdiction, a prize court, when sitting in any common law country, really administers a body of law common to all such countries. That is what Marshall, C. J., means when he says:

The United States having, at one time, formed a component part of the British empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it. . . . A case professing to be deciding on ancient principles

[15] The Zamora (1916), 2 A. C. 77, 91.

[16] LeCaux *v.* Eden, 2 Doug. 594; Lamar *v.* Brown, 92 U. S. 187.

[17] As an instance of this see Little v. Barreme, 2 Cr. 170.

will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.[18]

But there is no such court with respect to captures on land; if such a jurisdiction is desired, statutes, of the kind above described, are a prerequisite. That has caused an important difference between sea capture and land capture.

In sea capture no title passed until the captured thing had been brought into the prize court and condemned by its final judgment; wherefore, if an enemy vessel be taken by our ship *A*, rescued by an enemy war vessel, and then again captured by our ship *B*, who brings her into the custody of the prize court, she is lawful prize of the *B*, not the *A*.[19] But it is not so "in general, with regard to movable property on land. There the capture changes the ownership without adjudication, unless restrained by governmental regulations."[20]

But because the validity of a capture at sea depended on an adjudication, prize law became crystallized at an early date. With captures on land, on the contrary, there were, until our Civil War, but few opportunities for adjudication, and hence there was more chance, in advance of the law's crystallization, for the growth of humane theory to constitute a formative influence. But the operation of such forces has had certain reactions, resulting in the present view of land capture being more or less uncertain in outline. Consequently, while there has been much talk of recent years, in certain quarters, of altering the law of capture at sea, the effort

[18] Thirty Hogsheads of Sugar, 9 Cr. 190.
[19] *The Astrea*, 1 Wheat. 125.
[20] Lamar *v.* Brown, 92 U. S. 187.

of our courts, with respect to captures on land, has been to establish some sort of law at all.

Opportunities for adjudication of such points were in fact rare. As already said, land captures required no confirmatory sentence of a prize court; and usually it would only be in a case of conquest followed by incorporation of the conquered territory, as with India and in our Civil War, that the courts of the captor nation would be asked, by the original owner of the captured property, to pass upon the validity of its seizure. Nevertheless, after our Spanish War of 1898, the Supreme Court, on four occasions, adjudged at the suit of former enemies, questions of land capture. From these, put with our civil war cases, and one case that went to the Privy Council from India, we may gather the common law view of land capture.

At the outset of this inquiry we find two propositions accepted by the common law mind. One was that the mere fact of a state of war does not of itself transfer title to enemy property. In the absence of a confiscation statute, enemy property situated in our own country is not subject to capture, except such property as might constitute maritime prize,[21] but property situated in the enemy country is lawfully subject to capture, subject, however, to certain considerations.

First: It must be taken into possession, for the Roman doctrine of *intra praesidia*,[22] accepted by the prize courts as applying up to the time when the ship arrives in the custody of the prize court,[23] is a guiding first principle.

[21] Brown *v.* U. S., 8 Cr. 110.

[22] As to which see Bordwell, Laws of War 9 sq.

[23] *The Astrea* (*supra*).

Second: The title to all public property captured passes directly to the United States Government.[24] There is no exception or limitation to this proposition.

Third: Private property constituting the subject matter of capture also passes directly to the Government. The right of private pillage is not recognized by the laws of war as read by common law courts. Up through the Napoleonic wars pillage was recognized as lawful in the case of a town taken by storm,[25] but that rule has become obsolete; pillage indeed being made a special object of prohibition, under all circumstances. The second Hague Convention [26] forbids pillage, but long before that time Lieber's Code [27] forbade it "even after taking a place by main force." Pillage, therefore, confers no title. Not only have we for this the high authority of the Supreme Court,[28] but we also have two decisions to that effect rendered in Georgia after the Civil War; each case being a possessory action for property of the plaintiff which had been taken by the pillagers, following in the wake of the Federal army.[29]

Finally arises the question whether there should be any distinction in classes of personal property subject to capture. We have on the one hand the theory of Clausewitz [30] that requisitions of enemy property should have no limit except as fixed by the final exhaus-

[24] U. S. *v.* Huckabee, 16 Wall. 414; Elphinstone *v.* Bedeechrund, 1 Knapp P. C. 316, Atkinson *v.* Central, etc., Railway Co., 58 Ga. 227.

[25] This exception is allowed by Kent, 1 Comm. 92. Indeed it goes far back of Grotius' time. See Montaigne, Essay 14.

[26] Art. 28.

[27] Section 44.

[28] U. S. *v.* Klein, 13 Wall. 128.

[29] Worthy *v.* Kinomon, 44 Ga. 297; Huff *v.* Odom, 49 Ga. 395.

[30] On War, V, c. 14, 3.

tion of the country, and that in fact requisitioning should be used as a method of keeping the country down.

Opposed to that we have the theory that there must be some quality, appurtenant to the property itself, rather than the personality of its owner, which would justify the capture. And this quality must relate, in however direct or remote degree, to the welfare of the captor's government; it must subserve a war purpose of that government. Therefore, while all public property of the enemy was a free subject of capture [31] as constituting sinews of war from its very nature, no such generalization should be applied to private property. This distinction appears from the following language of our Supreme Court:

It does indeed appear to be a principle of international law that a conquering state, after the conquest has subsided into government, may exact payment from the state debtors of the conquered power, and that payments to the conqueror discharge the debt, so that when the former government returns the debtor is not compellable to pay again. This is the doctrine stated in Phillimore on International Law [32] to which we have been referred. But the principle has no applicability to debts not due to the conquered state. Neither Phillimore nor Bynkerschoeck, whom he cites, asserts that the conquering state succeeds to the rights of a private creditor. [33]

The necessary line of distinction regarding private property had been so clearly drawn prior to our Civil War, by many writers, including Halleck [34] and the

[31] Elphinstone *v.* Bedeechrund, 1 Knapp P. C. 316.
[32] Vol. 3, part 12, c. 4.
[33] Planter's Bank *v.* Union Bank, 16 Wall. 483.
[34] Int. Law. 456.

common law man Kent,[35] that our Supreme Court, during that conflict, at first accepted Kent's dictum that capture of private property is restricted "to special cases dictated by the necessary operation of the war," and never includes "the seizure of the private property of pacific persons for the sake of gain."[36] This, indeed, left a broad field for the courts' operations.

In the first place, it gave the courts room to establish a contraband list for land captures; and the article first placed upon this list was, as might be imagined from the nature of the Confederacy's resources, cotton. It was, said the Supreme Court, well known that cotton constituted "the chief reliance of the rebels for means to purchase the munitions of war in Europe," and that "rather than permit it to come into the possession of the national troops, the rebel government had everywhere devoted it, however owned, to destruction."[37] Independently, therefore, of the legislation afforded by the Confiscation Act of August 6, 1861, already mentioned, the court considered cotton a fair subject of capture. It became, therefore, axiomatic during the civil war "that cotton, though private property, was a legitimate subject of capture."[38]

Second in our order of speaking, though hardly in importance, was the principle that all property needful for the army was a legitimate subject of capture. Here we are at one of those many points of contact where the common law meets a principle originating in another body of law.

[35] 1 Kent Com. 91–93.
[36] *Mrs. Alexander's Cotton*, 2 Wall. 404.
[37] *Mrs. Alexander's Cotton* (*supra*).
[38] Lamar *v.* Brown, 92 U. S. 187.

Among the laws of war was the system of requisitions which had grown up, as a substitute for pillage. This system finds codification in an oft-quoted passage from the Memoirs of Marshal Saxe,[39] but it originated long prior to the Marshal's time.[40] In Napoleon's works may be found a valuable code of rules regarding a system which, as he said, had been used "time out of mind,"[41] and is based on the fundamental proposition that war should support war.[42] Of the same character are contributions, which originated in Gustavus Adolphus' practice of ransoming towns from pillage. Our Civil

[39] See Bordwell Laws of War, 43 sq.; Gregory, Contributions and Requisitions, 15 Columbia Law Review 20. In a letter to the Chief of Staff of the Army in Spain, Corr. No. 18418, Napoleon approves the Saxe regulations as standing out from "a collection of exceedingly mediocre reflections." Picard, Preceptes et Jugements de Napoleon 545.

[40] In Defoe's Journal of the Plague Year, he has a refugee from London assert that, despite a quarantine maintained in a village, he and his friend could take food and fire there, provided they first tendered money; to which his companion replied, "You talk your old soldier language, as if you were in the Low Countries now." Dugald Dalgetty, that life-like figure which Scott gives us, in the Legend of Montrose, of a soldier of fortune fresh from the wars of Gustavus Adolphus, is full of the learning of requisitions.

[41] *Ainsi depuis le monde est le monde.*

[42] *Que la guerre doit nourrir la guerre.* On the subject of requisitions, Picard has collected from Napoleon's writings over two pages of valuable reflections (Picard, Preceptes et Jugements de Napoleon, 228–230). These may be summarized as follows: (1) It should be done only by the supreme command, *general en chef, commissaire, ordonnateur en chef,* or in case of urgency, *le general de division;* (2) Outside of horses taken in battle, no soldier or officer can take prize of war; (3) Those things only should be taken which are necessary *aux soldats, aux hopitaux, aux transports, et à l'artillerie;* (4) Payment must be made in promissory notes or I. O. U.'s (*des bons sur lesquels on paiera par la suite*). The fixing of the price is a component part of the requisition. This last proposition, however, is not a necessary part of the law. Requisitions and contributions do not connote the idea of payment. In the Mexican War, the War Department instructed Generals Scott and Taylor to make no payments; but they nevertheless did pay for goods requisitioned, Birkhimer *op. cit.* 103. So did Lee's army pay for supplies requisitioned in Pennsylvania. Nevertheless, the commander's right to requisition goods without payment cannot be denied.

War affords examples of both practices.[43] The test of a contribution or requisition, under the common laws of war, should be simply the needs of the army.[44] Outside of this rule's protection, the taking is plain pillage, and its object is "mere booty of war."[45]

Such is that branch of the common law of war. For acts done in conformity with such rules, no officer or soldier should be in anywise liable. The Supreme Court fully expressed that view in these words:

But there could be no doubt of the right of the army to appropriate any property there, although belonging to private individuals, which was necessary for its support or convenient for its use. This was a belligerent right, which was not extinguished by the occupation of the country, although the necessity for its exercise was thereby lessened. However exempt from seizure on other grounds private property there may have been, it was always subject to be appropriated, when required by the necessities or convenience of the army, though the owner of property taken in

[43] One of General Pope's orders provided for a system of requisitions, and to it no exception can be taken, Ropes, The Army under Pope, 9. General Sherman excuses the system of foraging which he employed during the march to the sea, because "the country was sparsely settled, with no magistrates or civil authorities, who could respond to requisitions, as is the case in all the Wars of Europe." Sherman, Memoirs, Vol. II, p. 183. This, of course, has nothing to do with the destruction of property that occurred during the march. During the Confederate invasion of Pennsylvania, in the campaign of Gettysburg, General Early, commanding a division of the leading corps (Ewell's) imposed two contributions, one on Gettysburg, the other on York. The first contribution the General failed to collect, the second he collected in part. Gordon, Reminiscences 146–147; Doubleday, Chancellorsville and Gettysburg 113; Beecham, Gettysburg 38–40. For General Lee's protest against the excessive assessments levied by General Milroy on Winchester, and General Halleck's disavowal of the same, see Lee's Confidential Dispatches to Davis 70, and citations to the Official Records.

[44] Oppenheim, International Law, vol. 2, p. 146, Gregory *op. cit.*

[45] Planter's Bank *v.* Union Bank (*supra*).

such case may have had a just claim against the government for indemnity.[46]

Nor can a collateral attack upon a requisition order be any more effective. If the subject of the requisition be a chose in action, not merely must the debtor obey the order of attachment; but his payment in obedience thereto constitutes a perfect defense to a subsequent action by the original creditor.[47]

But while the courts thus accepted the principle, its application is quite a different thing. It is easy to state the principle as a theory of law, while giving the defendant the favorable side of it; it is quite a different matter to hold, in a common law court, that a commander's acts, committed in enemy country against the public enemy, were void in point of law. Outside of certain limits, narrow indeed as compared with the principle so readily accepted in the abstract, our courts have never even dreamed of holding any such acts to have been actionable or void.

During the flagrancy of the war, the commander's judgment as to the propriety of a contribution or requisition necessarily must be absolute, and so agree all the cases.[48] The same proposition would apply to destruction of property, as distinct from its consumption or use, during an active campaign. For any such act, therefore, the commander and his subordinates are not liable, in a civil action, to the aggrieved owner,[49] nor is

[46] Dow *v.* Johnson, 100 U. S. 158.

[47] Harrison *v.* Myers, 92 U. S. 111; Gates *v.* Goodloe, 101 U. S. 612.

[48] Elphinstone *v.* Bedeechrund, (*supra*); Dow *v.* Johnson (*supra*); Ribas y Hijo *v.* U. S., 194 U. S. 310, 24 Sup. Ct. 727; Herrara *v.* U. S., 222 U. S. 558, 32 Sup. Ct. Rep. 179.

[49] Elphinstone *v.* Bedeechrund (*supra*); Dow *v.* Johnson (*supra*). "This doctrine of non-liability to the tribunals of the invaded country for acts of

the Government liable to suit in the Court of Claims because of the principle to which further attention will later be called, that no claim lies against the Government for a tort.[50]

The final conclusion, which all decided cases makes us accept, is that the act of a commander could under no possibility be questioned, except when it occurs during a quiet occupation of territory as distinct from occupation in full campaign. There, indeed, is the only real line of distinction. In full campaign, the commander's acts are non-justiciable. But when "the conquest has subsided into government" to use the Supreme Court's language above quoted, the common law power of review can intrude itself. Such a review was had in Raymond *v.* Thomas,[51] discussed in the last chapter; and such a review possibly would have been had in O'Reilly *v.* Brooke,[52] were it not for the circumstance of ratification to which we shall advert.

Since the Government is in no way liable to a former enemy in any claim of tort, his suit of necessity must be brought against the officer making or authorizing the capture. If the capture was not in accordance with the

warfare is as applicable to members of the Confederate army, when in Pennsylvania, as to members of the National Army, when in the insurgent States. The officers or soldiers of neither army could be called to account civilly or criminally in those tribunals for such acts, whether those acts resulted in the destruction of property or the destruction of life; nor could they be required by those tribunals to explain or justify their conduct upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war." Dow *v.* Johnson (*supra*). To the same effect are two decisions recently rendered, concerning requisitions made by Carranzista commanders in Mexico. Oetjen *v.* Central Leather Co., 38 Sup. Ct. Rep. 309; Rigand *v.* American Metal Co. *id.* 312.

[50] Ribas y Hijo *v.* U. S. (*supra*); Herrara *v.* U. S. (*supra*).

[51] 91 U. S. 712.

[52] 209 U. S. 45; 28 Sup. Ct. Rep. 439.

laws of war as above outlined, then theoretically the plaintiff could recover, but it is always open to our Government to ratify an act committed by an officer. When that ratification has been made, the case is then within the principle whose existence in the abstract remains, however modified by pledge or practice, that "whatever shall be the subject of capture, as against his enemy, is always within the control of every belligerent. Whatever he orders is a justification to his followers."[53] The case then passes from the domain of the common law into affairs of State, of which the common law courts can take no cognizance.[54] In O'Reilly *v.* Brooke, General Brooke, during the military occupation of Cuba, issued an order abolishing the office of Hereditary Slaughterer of Cattle in Havana, and the concessionaire, a Spanish Countess, sued him for damages. On the defendant showing that after his order had been issued it was ratified by the indemnity provision contained in the Platt amendment,[55] the Supreme Court held that the defendant was not liable. The court said that, whatever might be the modern rule as to the protective effect of a master's ratification, of his servant's tort, the old doctrine of full protection "still is applied, to a greater or less extent, when the master is the sovereign." Therefore, "where, as here, the jurisdiction of the case depends upon the establishment of a 'tort only in violation of the law of nations, or of a treaty of the United States', it is impossible for the courts to declare an act a tort of that kind when the Executive, Congress, and the treaty-making power all have adopted the act."

[53] Lamar *v.* Brown, 92 U. S. 187.

[54] O'Reilly *v.* Brooke (*supra*); Buron *v.* Denman, 2 Exch. 167.

[55] Act of March 2, 1901, 31 Stat. 897.

In this connection let us again return to the civil war statutes. The confiscation acts of 1861 and 1862 might have been considered as merely defining classes of enemy property fit for capture, leaving it for the courts to devise a method of condemnation proceedings *in rem* similar to the proceedings of a prize court.[56] But the Captured and Abandoned Property Act went even further in language. Despite the "humane maxims" of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war,[57] this statute failed to define the classes of property suitable for capture. As no claimant could succeed in a suit for the property's proceeds unless he could show that he had been either loyal or pardoned, it would result that, on the face of the statute, all property belonging to real enemies was the subject of lawful capture.[58] The Supreme Court, however, never gave the statute such a broad meaning, but rather, in the cases actually before it, was careful to point out that cotton, which was the subject matter of each decided case, was, for the reasons already given, lawful spoil. It was also careful to say that, while statutes like the confiscation acts might enlarge the classes of property subject to capture, the Government might equally well, by a public pledge, limit such classes. The whole tenor of the legislation and proclamations during the Civil War constituted such a pledge; a pledge that districts brought under complete and permanent control by the United States troops were not to be treated as theaters of war or as

[56] Miller *v.* U. S., 11 Wall. 268; Tyler *v.* Defrees, 11 Wall. 331.
[57] U. S. *v.* Klein (*supra*).
[58] Lamar *v.* Brown (*supra*).

subject to requisitions.[59] The law then stood practically that in the absence of a pledge restricting, or a statute extending, the classifications of private property for purposes of capture, the courts will, in theory, allow the doctrines of the common laws of war.

And those doctrines, as we have seen, whatever they may be, can be applied by common law courts only in the case of quiet government as distinct from full campaign; and even then only to the extent that the Government has neither directed nor ratified the act in question. The Supreme Court was right, therefore, in recently saying that, by none of the decisions already examined, was it "intended to express a limitation upon the undoubted belligerent right to use and confiscate all property of an enemy and to dispose of it at will," and that, as for Kent's rule, "the question could be raised whether it presented a case for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel (at a violation of it)."[60]

The subject thus discussed has, so far, presented itself to our courts only with respect to enemy property in the shape of goods and credits. Concerning the conqueror's alleged right to requisition the service or labor of the enemy citizen for non-military purposes, no common law court has as yet had occasion to make a suggestion. Consistency with the scheme of this book would, therefore, induce a like silence on the writer's part.

[59] *The Venice*, 2 Wall. 258; Planters' Bank *v.* Union Bank, 16 Wall. 483. In Gates *v.* Goodloe cited *supra*, the Court noted, as a distinguishing feature, that the military occupation was neither complete nor substantial.

[60] Herrara *v.* U. S. (*supra*).

VIII

THE SOLDIER'S RELATION TO THE CIVILIAN IN TIME OF PEACE

At an earlier juncture we dealt with the soldier in relation to his fellow or superior in the army. We have just examined the relation which the army and its members bear to the enemy, armed and non-combatant, at home and abroad. It remains to consider the duties and obligations of the army and its members with respect to the civilian population of our own country. These duties and obligations vary with the circumstance of peace or war, and necessarily, because the uses of the army expand or contract according to whether its medium is the state of peace or the state of war.

When we commence our inquiry, as we naturally would, with the state of peace, we realize instantly that all questions as between the soldier and the civilian are within the jurisdiction of common law courts. Naturally the common law controls all the actions of all persons except those who, by virtue of particular status, have put themselves within the exclusive jurisdiction of some special court. The court martial, as we have seen, has jurisdiction only of military offenses, and at best its jurisdiction is merely concurrent with that of a civilian criminal court in a case where a military offense may also constitute a crime.

Outside of military offenses, there is no question of status about the soldier. If he is interested in a propo-

sition of property or contract, that question is determined in the civil courts. Usually it is a matter of accident that a party happens to be in the military service, the materiality of such a circumstance consisting mostly in questions of domicile.[1] For that reason, the demand for some sort of moratorium with respect to debts owing, and necessary burdens, like life insurance premiums, borne by soldiers now in our service, had to be fulfilled by statute, for, in the absence of a statute, no common law court can refuse to enter judgment against a debtor simply because he is doing his duty for the government. That statute Congress has given us in the Act of March 8, 1918.

The only case in which the soldier's status can be of any substantive interest to a common law court, therefore, is where the issues involve the duties and obligations of the soldier insofar as they may impinge upon a civilian's rights. If a soldier shoots a civilian in the street and is sued for an assault, obviously the fact that the defendant is a soldier is of no importance. But if the soldier were a sentry and shot a civilian who was trying forcibly to enter a Government reservation, then the fact that the defendant was a soldier requires the Court to determine whether he had exerted such powers as the law allowed him, and no more, in committing the act.

In considering a case of this sort we must eliminate at once any circumstances which, apart from the particu-

[1] "It appears that General Grant at the time of his death was an officer in the regular army of the United States. The domicile of military men is often more difficult for the courts to determine than is the domicile of those in civil life. The adjudications bearing on the principle of domicile, applicable to non-military persons, are not, I think, always relevant in cases involving the principle of domicile as it is applied to military or naval men." Surrogate Fowler, in Matter of Grant, 83 Misc. 257.

lar questions in which we are interested, cannot be of decisive force. We can thus eliminate questions of the kind raised in Bean *v.* Beckwith[2] and Beckwith *v.* Bean,[3] whether a misdemeanant can be arrested without a judicial warrant,[4] because such points have nothing to do with the military status of the defendant. It is only when, under the facts of the case, such questions can be eliminated, that we get to the legal propositions which are involved in the military status of the defendant inflicting the harm.

First of all, let us remember that no case of this sort can arise unless the defendant pleads that he committed the acts under the obligations which his official position, as recognized by law, imposed upon him. The defendant must plead an obligation resting upon him to do, as he conceived it, the acts which harm the plaintiff. The source of such an obligation is exterior to the defendant's will. The common law court cannot recognize any impulse other than one recognized by the law itself, and as the defendant, by the plea in question, admits that, outside of the special obligations of his position, his act would be a wrong, he must find a foundation for his obligation in a positive rule in the shape of a statute, or regulation enacted pursuant to statute, or the order of a superior given pursuant to regulation and statute. If he can find something of the sort, then he presents a case where, although the harm, to use Professor Burdick's terminology,[5] as distinct from the injury, was undoubtedly inflicted, the cause of the harm, the person

[2] 18 Wall. 510.
[3] 98 U. S. 260.
[4] See Davis, Military Law, 493 n.
[5] Burdick, Torts, 2d ed., 42.

responsible therefor, is not the defendant but the government.

Assuredly the court has jurisdiction to pass upon the soundness of such a plea, for if the defendant fails to make it good, then the case must proceed to judgment. "Where an individual is sued in tort for some act injurious to another in regard to person or property, in which his defense is that he had acted under the orders of the government . . . he is not sued as an officer of the government but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such office. To make out that defense, he must show that his authority was sufficient in law to protect him."[6] By virtue of such reasoning it has been held that where officers of the government are in possession of land as a military reservation, and the plaintiff brings ejectment, claiming title, and defendant's plea of the government's title presents only a question of title, if the plaintiff's claim is superior he will of course prevail.[7] Always, then, not only must the defendant assert lawful authority for his act, but he must demonstrate it.

This authority can be either express or general, and according to its nature the defendant's field of volition and decision is broad or narrow. But whether the defendant executes an express order, or his action is the immediate result of a decision made under general orders or regulations, he must, in order to escape an adverse judgment, be able to show that the authority within whose protecting field he acted was sanctioned by

[6] Cunningham *v.* Railroad Co., 109 U. S. 446; Stanley *v.* Schwalby, 147 U. S. 508, 13 Sup. Ct. Rep. 418.

[7] Meigs *v.* McClung, 9 Cr. 111; Wilcox *v.* Jackson, 13 Pet. 498; see U. S. *v.* Lee, 106 U. S. 196.

law. Apt illustration is afforded by Little *v.* Barreme.[8] There an officer, acting under Presidential order, seized an American vessel sailing from a French port, and was cast in damages, because the court held that that order was not justified by any executive power confided by the Constitution. That case settled the law, at least with us, that illegal instructions cannot change the nature of the transaction or legalize an act which, without those instructions, would have been a plain trespass. Chief Justice Marshall's first bias was, as he said "in favor of the opinion that though the instructions of the Executive could not give a right, they might yet excuse from damages," but he yielded that prepossession in favor of the rule above stated. On the authority of such decisions, we may take it that "whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians in time of peace, by orders emanating from a source which is itself without authority."[9]

[8] 2 Cr. 170.

[9] Bates *v.* Clark, 95 U. S. 204, 209. In Dinsman *v.* Wilkes, *infra*, the Supreme Court refers with approval to the unreported case of Captain Gambier, mentioned by Lord Mansfield in Mostyn *v.* Fabrigas, Cowp. 161. The entire language of Lord Mansfield, as used in that connection, does not have much weight: "I remember one, I think it was an action brought against Captain Gambier, who, by order of Admiral Boscawen, had pulled down the house of some sutlers who supplied the navy and sailors with spirituous liquors; and whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the sailors was affected by frequenting them. They were pulled down: the captain was inattentive enough to bring the sutler over in his own ship, who would never have got to England otherwise; and as soon as he came here he was advised that he should bring an action against the captain. He brought his action, and one of the counts in the declaration was for pulling down the houses. The objection was taken to the count for pulling down the houses; and the case of Skinner and the East India Company was cited in support of the objection. On the other side, they produced from a manuscript note a case

No different in principle is the rule which applies to the officer who acts under general authority involving a power of decision. So long as he can point to lawful authority outlining the field of jurisdiction, within which his decision is made, he is safe on any decision made in good faith, even though his decision on the facts presented to him may be wrong. Just as with the case of a court martial or the action of a superior with respect to an inferior in the service, so it is with respect to the officer's decision insofar as it affects a civilian. The only question is whether the decision is made on a question which it comes within the defendant's jurisdiction to decide. In any such case as that he acts in a quasi-judicial capacity, and the common law then gives him the benefit of the same rule that it applies to anyone else who is rightfully vested with a power of decision. The officer in such a case is not liable in damages for the result of his decision, even though it might have been wrong, because with the power of decision

before Lord Chief Justice Eyre, where he overruled the objection; and I overruled the objection upon this principle, namely, that the reparation here was personal, and for damages, and that otherwise there would be a failure of justice; for it was upon the coast of Nova Scotia, where there were no regular courts of judicature; but if there had been, Captain Gambier might never go there again; and therefore the reason of locality in such an action in England did not hold. I quoted a case of an injury of that sort in the East Indies, where even in a court of Equity Lord Hardwicke had directed satisfaction to be made in damages: that case before Lord Hardwicke was not much contested, but this case before me was fully and seriously argued, and a thousand pounds damages given against Captain Gambier. I do not quote this for the authority of my opinion, because that opinion is very likely to be erroneous; but I quote it for this reason—a thousand pounds damages and the costs were a considerable sum. As the captain had acted by the orders of Admiral Boscawen, the representatives of the admiral defended the cause, and paid the damages and costs recovered. The case was favorable; for what the admiral did was certainly well intended; and yet there was no motion for a new trial."

goes, according to the common law, immunity from the consequences of the decision; the common law taking the homely view that, in the very nature of things, a power of decision must carry with it immunity from its consequences, so long as the quasi-judicial functionary uses his judgment in good faith. An officer vested with such a power of choice is, in the language of the Supreme Court, at least to be considered as "the expert on the spot," and while he may be called upon later in court to justify his conduct, still "great weight is to be given to his determination and the matter is to be judged on the facts as they appeared then, and not merely in the light of the event."[10]

Whether an officer is so vested is of course a question of law. Thus in Dinsman *v.* Wilkes,[11] which we previously considered, it was held that the captain of a war vessel was vested with such quasi-judicial power in the case of a seaman who claimed that his term of enlistment had expired, the vessel being then in foreign parts. The seaman there had previously the special status of a member of the military force, and by his very assumption of that status had submitted himself to the judgment of just such a quasi-judicial tribunal.

And whenever the common law finds an officer vested with such a power of choice, then his subordinate who acts under his direction is protected, even though that direction may be wrong. He is exactly in the position of any other ministerial officer of a court with limited jurisdiction who executes the court's mandate; he is protected so long as the order is fair on its face.[12] Thus a

[10] Moyer *v.* Peabody, 212 U. S. 78, 29 Sup. Ct. Rep. 235.

[11] 12 How. 290.

[12] McCall *v.* McDowell, 1 Abb. U. S. 212, Fed. Cas. 8673.

functionary who executes the mandate of the court martial is protected by its process, even though the court martial made a wrong decision, so long as it appears on the face of the process that the court has jurisdiction.[13] Such a case, therefore, is to be distinguished from *Ex parte* Field [14] where the refusal of a jailor to obey the habeas corpus issued for a military prisoner was held to be in contempt of court, although the refusal was pursuant to orders of the Secretary of War. As the Court considered, the Secretary of War not being able to point to any statute or proclamation authorizing his action, his subordinate naturally could not do it either.

But if the officer, thus possessing a field of jurisdiction, takes a course which is entirely outside of the jurisdiction conferred upon him by general orders or regulations, then he is not within the protection of the doctrine applicable to a quasi-judicial officer. It is on this point that such a case as Bates *v.* Clark,[15] and the more famous case of Mitchell *v.* Harmony[16] turn. In the first case the defendant, an army captain, seized some whiskey, supposing it to be destined for an Indian country, but as the Indians had recently been removed from the reservation in question, it was not, under the statute, Indian country. It was held that the defendant was liable in an action for the value of this whiskey, on the same basis as any other case of conversion.

In Mitchell *v.* Harmony. as subsequently stated by

[13] Savacool *v.* Boughton, 5 Wend. 170, overruling Smith *v.* Shaw, 12 Johns. 257; see also Chegaray *v.* Jenkins, 5 N. Y. 376.

[14] 5 Blatch. 63, Fed. Cas. 4761.

[15] *Supra.*

[16] 13 How. 137.

Mr. Justice Field [17] "the property of the plaintiff had been seized by an officer of the army of the United States, upon the belief that he was unlawfully engaged in trading with the enemy. It turned out that he had been permitted by the executive department of the Government to trade with the inhabitants of neighboring provinces of Mexico which were in possession of the military authorities of the United States. In an action for trespass for seizing the property, the defendant, among other reasons, justified the seizure on the ground that he acted in obedience to the order of his commanding officer, and therefore was not liable." The Court, however, held him liable, adding "that the defendant did not stand in the situation of an officer who merely obeys the command of his superior, if it appeared that he advised the order, and volunteered to execute it, when that duty more properly belonged to an officer of an inferior grade." If the defendant in that case had merely obeyed an order from a superior officer which appeared fair on its face, the fact not being disclosed to him that the plaintiff had a Presidential license, then the defendant would have been protected as a ministerial officer acting under an order from a superior which showed jurisdiction on its face. But the defendant assumed a higher position of decision in the matter. That being so, it was upon him to justify the jurisdiction which he thus assumed; and the fact of the Presidential license depriving him of jurisdiction, he was left as utterly without defense as was the defendant in Bates *v.* Clark.[18]

[17] Beckwith *v.* Bean, 98 U. S. 266.
[18] *Supra.*

This principle is by no means confined, in its application, to army officers. The civilian, in his daily life, is subject to the same obligation and whoever disregards it must take the consequences. Strikingly is this shown in Phelps *v.* Aldujo.[19] There the plaintiff sued on a policy of marine insurance, alleging loss by capture of his vessel by the enemy, to which a plea was interposed that the vessel had deviated from the insured voyage, thus violating the implied warranty against deviation. It appeared that while the vessel, being under convoy, lay in a port of call, the commander of the convoying cruiser, seeing a strange sail in the offing, directed the master of the plaintiff's vessel to go out and examine the stranger. Obedience to this order resulted in the capture of the plaintiff's ship, for the stranger turned out to be a French privateer. The court held that the plaintiff could not recover, because his ship, by going out to examine the strange craft, was guilty of deviation from the voyage, and that this deviation was not excusable as done under lawful constraint, because the commander of the convoying vessel had no authority to give the order which he did. Thus the hard consequences of a commander's unauthorized order fell entirely on the civilian whose agent had obeyed it.

It is of interest to note, however, that even in such cases as that, the common law recognizes, so far as it may, the pressure of obligation which is the constant companion of the soldier. It cannot withhold judgment against him, but, the substantive right being settled, it can control the quantum of damages. Although an officer's acts, failing of any justification of the kind

[19] 2 Camp. N. P. 350.

above outlined, constitute an actionable tort, he may yet avail himself of the circumstances which impelled, though they did not justify, his decision, by way of mitigation of damages. Such circumstances, say our courts, are proper "to rebut the presumption of malice which might arise from the simple arrest and imprisonment, unaccompanied by any explanation of the reason therefor."[20] To this extent does the law repel Professor Dicey's rather glib statement that a soldier may "be liable to be shot by a court martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it."[21]

Hardships, however, have doubtless occurred, and may occur again. Indemnity acts, of the kind hereinafter discussed, are a sort of antidote; but the infirmities of that sort of remedy are also to be reckoned with. The best cure is to be found in an enlightenment of the courts, an enlightenment which will enable them to see more clearly the bounds of discretion which may attend the particular duty cast upon the defendant. Mitchell *v.* Harmony was rightly decided if the defendant's powers forbade him to touch the goods of one travelling under a license to trade with the enemy. But courts should recognize that the exigencies of a march in time of war should permit of any camp follower being turned back if, in the judgment of the commander, his presence is harmful. The same court could thus decide today, without violating the real principle on which rests Mitchell *v.* Harmony.

It is of course possible to have a case where the remedy which the plaintiff seeks does not involve hold-

[20] Beckwith *v.* Bean, *supra;* McCall *v.* McDowell, (*supra*).

[21] Dicey, Law of the Constitution, 8th ed. 299.

ing an officer at all. If an officer remains in possession of property taken from the plaintiff, the plaintiff may bring a possessory action which, resulting in the restoration of the property, will terminate the matter. Such cases are Meigs *v.* McClung [22] and Wilcox *v.* Jackson,[23] in each of which the plaintiff brought ejectment for land which the Government had occupied as an army post.

On the other hand, the plaintiff may seek against the officer relief which is highly improper in any action, other than one against the United States itself. Such a case arises where the officer, in behalf of the Government, is using apparatus which infringes a patent owned by the plaintiff. The usual remedy which an injured patentee seeks is not damages against the infringer, but equitable relief in the shape of an injunction to prevent the continuance of the use, and an accounting for the profits which the wrong-doer, up to that time, might have derived from the use of the infringing apparatus. The courts long ago held that a suit should not succeed against an officer who has used the apparatus only in the government's behalf. Only the government has derived any profits, and it cannot be sued; nor should an injunction be granted whose effect impedes a government activity. The officer's possession being solely for governmental use, the suit in effect is against the government, and, therefore, it cannot be maintained. That proposition was finally decided by the Supreme Court, in Belknapp *v.* Schild.[24] A decision similar in principle

[22] 9 Cr. 111.
[23] 13 Pet. 498.
[24] 161 U. S. 10, 16 Sup. Ct. Rep. 443.

was rendered in England, where the principal for whom the subordinate was acting was a foreign sovereign,[25] and hence also immune from suit. The point of both decisions was the same, that an injunction would be of no avail because the real offender was the government, and an accounting for profits would be unavailing, because the governmental principal had received the profits, and not the officer actually using the apparatus. The whole question was rendered academic by recent legislation allowing the injured patentee to sue the government, not for an injunction it is true, but for profits, in the Court of Claims. This gives the government a roundabout method, at once of appropriating the use of a patent by way of eminent domain, and of compensating the owner for such use. It follows that the officer or agent through whom the government acts is not liable to the owner even in an action for damages, to say nothing of an accounting.[26]

That leads us to the general question, if the officer acted under due authority of law, when, if ever, can the plaintiff turn for redress to the government which authorized the act?

Whatever may be the true history of it—and those who may be interested are referred to the opinions both of the majority and minority in U. S. *v.* Lee [27] and to the opinions rendered in a recent English case [28]—it is the fact that never has the British Crown allowed a subject to sue it by means of a petition of right, for redress for

[25] Vavasseur *v.* Krupp, 9 Ch. Div. 351.

[26] See Marconi Wireless Co. *v.* Simon, 38 Sup. Ct. Rep. 275; Cramp *v.* Int. Curtis Co. *id.* 271.

[27] 106 U. S. 196.

[28] *Re* Petition of Right (1915) 3 K. B. 649.

any mere damage, nor outside of the legislation relating to patents, above mentioned, has our Government, in any of its statutes relating to the Court of Claims, or the District Courts under the Tucker Act, authorized a citizen so to sue it.[29] In any such case the plaintiff must go remediless. It is only where an authorized act has resulted in the enrichment of the government by the taking of a plaintiff's property, or perhaps even its use, that the plaintiff can have any redress against the government.[30] In any other case of authorized damage, the plaintiff can sue neither the officer who acted under authority, nor the government.[31]

A situation of more difficulty may arise where the government undertakes to ratify a wrong which in the beginning was unauthorized. Parenthetically, we must note that this intention to ratify should appear, because a mere subsequent authorization cannot operate as a ratification.[32] If the government were in like case with a human principal, its ratification of a tort could not terminate its servant's liability; it would simply add to the number of parties who would be liable for the tort. That, at least, seems to be the modern view, whatever might have been the original state of the law.[33] But the government's ratification, if it is to have any effect at all, must make the act no tort, because, if the ratification is valid, it goes back to the date of the act, and then

[29] U. S. *v.* Lee, *supra*; U. S. *v.* Russell, 13 Wall. 623; Ribas y Hijo *v.* U. S., 194 U. S. 310; 24 Sup. Ct. Rep. 727; Herrara *v.* U. S., 222 U. S. 558; 32 Sup. Ct. Rep. 179; *Re* Petition of Right, *supra*.

[30] U. S. *v.* Russell, *supra Re* Petition of Right, (*supra*).

[31] McCall *v.* McDowell, 1 Abb. U. S. 212; Fed. Cas. 8673; O'Reilly *v.* Brooke, 209 U. S. 45; 28 Sup. Ct. Rep. 439; Buron *v.* Denman, 2 Exch. 167.

[32] *Ex parte* Field, 5 Blatch. 63; Fed. Cas. 4761.

[33] See opinion of Holmes, J., in O'Reilly *v.* Brooke, *supra*.

it would have the effect of making the act legal which previously had been illegal.

Obviously, in a case of ratification it would be just as incumbent on the defendant to plead the ratification as it would be incumbent on a defendant, acting under prior authority, to show it. What the defendant should never overlook is that, outside the domain of authority, he has committed a tort. And it is for him to show authority, whether previously existing or flowing from ratification. If he does not show this, he cannot blame the court for proceeding to judgment against him. Viewed in this light the case of Bean *v.* Beckwith,[34] which some seem to have thought open to criticism as being one of those cases where the military officer is hanged by judge and jury, has no such bad effect. As the Supreme Court in a later case pointed out,[35] the defendant's plea was insufficient. In other words "whether there was in that case a special order of the President to the provost marshal, or whether he assumed to arrest and imprison the plaintiff under some proclamation or general order, did not appear by the plea, and as it was a case of arrest and imprisonment, this Court held that the authority of the defendants to make it should be specifically set forth."[36] Even a verbal order in any such case would be sufficient.[37]

The Indemnity Acts of civil war times did not go as far, by way of ratification, as the statute which protected General Brooke.[38] At the time that he abolished

[34] 18 Wall. 510.
[35] Mitchell *v.* Clark, 110 U. S. 635.
[36] Mitchell *v.* Clark, *supra.*
[37] Mitchell *v.* Clark, *supra.*
[38] O'Reilly *v.* Brooke, *supra*, discussed in Ch. VII.

the plaintiff's office of Hereditary Slaughterer of Cattle, General Brooke had not even color of authority, unless it was such authority as flowed from the law of military occupation. That was either sufficient or it was not, but as the Supreme Court's decision did not turn on that at all, we may take it as though the general acted entirely without color of authority. He was thus left to the Platt Amendment, which ratified all acts done during the military occupation. The Indemnity Acts of civil war times, on the contrary, ratified only such acts as were done under orders, leaving the officer who constituted the source of the order helpless in the absence of being able to point to some order or regulation ahead of him. This is illustrated by the decision in McCall *v.* McDowell.[39] General McDowell, Department Commander at San Francisco, ordered the provost marshal to arrest all persons expressing sympathy with the assassination of President Lincoln, as "virtually accessories after the fact." There was no state of martial law. Deady, J., held that General McDowell was liable because the Indemnity Acts did not apply, he having not issued his order pursuant to any Executive authority or order of the President or Secretary of War; but that the provost marshal was not liable because he acted under the orders of General McDowell, his superior, and that the order was not "palpably illegal." This last qualification was wholly unnecessary, because the Acts were broad enough to cover the case of anyone acting under orders, whether the orders were palpably illegal or not.

[39] *Supra.* To the same effect, see Milligan *v.* Hovey, 3 Biss. 13, Fed. Case 9605.

IX

RELATION OF SOLDIER TO CIVILIAN IN TIME OF WAR

The army's primary function, as previously said, is the defense of the nation from the public enemy. That defense can be expressed only in terms of physical force; there is no other medium. The qualities of the great commander may reach the highest points of intellectual endeavor, but they are exerted in the assembly and direction of force. No war has ever been won by means of anything else; words have never been a substitute for armed endeavor, once resort is made to belligerency, from the days of Byzantium even to our own. When war is declared, the army stands ready to deliver the necessary blows; it is lawful for it to do so, and the common law recognizes the fact. The army's sphere of lawful action, therefore, automatically enlarges with the coming of the state of war.

As an immediate consequence—immediate in point of law, however delayed by circumstances it may be in application—the orb of the citizen's right contracts. Things that the soldier might not lawfully do in time of peace, he may conceivably do now with lawful immunity; and conversely, things of which the citizen might rightfully complain in the days of peace, will not serve as the subject matter of a suit when the nation is at war. Nor is this theorem limited to direct acts of the army and those of its instant direction. With a force equal in

the abstract, but much more apparent to the average observer, it applies to the constitutional restraints of government. In support of the war, and, therefore, of the army, the government's constitutional powers take on a wider range. The "war powers" of the executive, the wider scope of permissible legislation given Congress, may properly reach far beyond the landmarks which the Constitution fixes for our journey through the days of peace.

Of this proposition in the abstract, there can be no doubt. Proofs of its acceptance, so far as governmental and legislative action is concerned, lie all about us at this writing. As war measures now in force, we have a government bureau under the Act of August 10, 1917, regulating and directing dealings in and use of grain and meat. Under the same Act we find another bureau regulating the supply and use of fuel. Under the Army Appropriations Act of 1916,[1] we have the government taking over the railway systems of the United States; this taking having been effected by the President's proclamation of December 26, 1917. The Espionage Act of June 12, 1917, and the Trading with the Enemy Act of October 6, 1917, combine in their effect of giving the President complete control of all matters of export and import; to say nothing of the increased powers which the Postmaster General now enjoys by virtue of these same enactments. No one has claimed that these war measures are unconstitutional; all should approve them so far as they subserve their one object, the successful conduct of the war. Yet they outdo anything in our history; no previous war was ever fought

[1] Act August 29, 1916, 39 Stat. 659.

with all grain, meat and fuel under commandeer, to mention but a few features of our legislation. England has proceeded to like extremes; England, the home of the individualist, has in some points outstripped us.

The principle which justifies these things is as old as the common law; older than written constitutions, it, therefore, informs them. Indeed the principle is older than the common law; like the *jus naturae* of the medievalists, it pervades every system of law. That principle is that the rights of the individual must yield to those of the State in the time of the State's peril from the public enemy. This amounts to no deification of the State, and nothing of the Prussian is in it; for the State's right, in time of her peril, should be supreme, and the acts of her agents, in carrying out her commands, lawful; else we would have no State at all. "In these cases," says our supreme court, "the common law adopts the principles of the natural law, and finds the right and the justification in the same imperative necessity."[2]

This proposition finds ample room in Coke's reports —that fount of the common law. In the Case of the Prerogative[3] it is said: "For the commonwealth a man shall suffer damage, as for saving a city or town a house shall be plucked down if the next one be on fire." It is therefore undoubted law today, that no action lies for such an act as just described, when done by one acting under lawful authority.[4] In another case in the same volume of Coke's reports,[5] reference is made to the same doctrine.

[2] Bowditch *v.* Boston, 101 U. S. 16.
[3] 12 Co. Rep. 13.
[4] Bowditch *v.* Boston, *supra.*
[5] Mouse's Case, 12 Co. Rep. 62.

This principle, according to the same unquestioned authority, applies in time of war. "When enemies," says Coke, "come against the realm to the seacoast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And, therefore, by the common law, every man may come upon my land for the defence of the realm, as appears 8 Edward IV 23. And in such case on such extremity they may dig for gravel, for the making of bulwarks; for this is for the public, and everyone hath benefit by it; but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance."[6] At a later date this proposition was repeated as undoubtedly of sound law: a tort, when done for the public good in matter of emergency, is excusable, "as in time of war a man may justify making fortifications on another man's land without license."[7] Counsel for the defendant, in the famous case of ship-money, were forced to admit that their contention did not affect the soundness of this proposition.[8]

The same right, in case of emergency, extends to the property of neutrals which may be found within the country. But the limits of this rule of angary, as extended by the United States Government during the Civil War, overlap so much the bounds of international law as to place the whole subject outside the proper

[6] Case of Prerogative, 12 Co. Rep. 13.

[7] 1 Dyer 36 *b*.

[8] Rex *v*. Hampden, 3 How. St. Tr. 826; See also 18 Law Quarterly Review, 135–136, 155.

domain of this book;[9] the topic of domestic requisitioning, indeed, being brought into our present discussion more by way of illustration than as a principal objective.

For all such acts, according to common law theory, neither was the agent of the State liable—"a thing for the commonwealth a man may do without being liable to an action,"[10] but the State itself owed no duty of compensation. That doctrine has persisted in England without any possible line of distinction;[11] but perhaps that very thing induced the provision in our national constitution that private property shall not be taken for public use without compensation.[12] This makes our courts draw a distinction between the mere destruction of property in times of emergency, and its use or taking. In the one case there is no state obligation of payment;[13] but where the government has used or appropriated the thing in question, then an implied obligation, of compensating the owner, is imposed upon the government.[14]

But our government, however just the debt it may owe, is not suable by petition of right as is the English crown;[15] and hence, in any such case of a taking, the owner will go remediless unless Congress appropriates funds for his relief, or confers jurisdiction on the Court

[9] See *The Zamora* (1916), 2 A. C. 77, and American authorities there discussed.

[10] Case of Prerogative, *supra*.

[11] *Re* a petition of right (1915) 3 K. B. 649; *The Zamora* (1916) 2 A. C. 77.

[12] U. S. Constitution, Fifth Amendment.

[13] Bowditch *v.* Boston, *supra*.

[14] U. S. *v.* Russell, 13 Wall. 623; Pugh *v.* U. S., 13 Wall. 633; U. S. *v.* Kimball, 13 Wall. 636.

[15] See U. S. *v.* Lee, 106 U. S. 196; *Re* a petition of right, *supra*.

of Claims or local Federal courts to hear the application.[16] The English courts, on the contrary, have jurisdiction as of course, of all applications, by way of petition of right, founded on debts owing by government; but they hold that applications of the class now under consideration have no merit at common law.[17] It is our constitutional provision that gives them merit with us. Yet, because such cases cannot have their day in court without leave of Congress, the ultimate result is the same in both countries. For property taken in an emergency there is no payment unless government chooses to pay.

The above considerations make it clear that the validity of such an act depends upon no statute; rather it springs from the common law. The English courts, therefore, consider it clear that the right partakes of the crown's prerogative, and needs no act of Parliament for its sanction. It is true that in the winter of 1803–1804, when Napoleon's threats of invasion were in the air, Parliament enacted two statutes[18] which gave the crown power to take land for military purposes, on making just compensation. But as Lord Cozens-Hardy, M. R., has recently shown in the case last cited, the preamble of these statutes fully recognized the crown's power to take the land, without statute and without payment. During the present war, the crown seized a subject's land for purposes of an aviation camp. By dismissing his petition of right, filed to obtain compensation for being deprived of the land, the English courts

[16] It is noteworthy that Congress excluded such cases from the Court of Claims' jurisdiction during the Civil War. See U. S. *v.* Russell, *supra*.

[17] *Re* a petition of right, *supra*.

[18] 43 Geo. III, c. 55; 44 Geo. III, c. 95.

have finally made it clear that, in their view of the common law, neither is a statute necessary in such cases, nor need there be any compensation.[19]

Our constitutional provision requires compensation for a taking, as we have seen. But our courts seem to agree with those of England in the proposition that no statute is necessary for a case of emergency. The government's implied contract to pay the owner for the property taken arises, says the Supreme Court, only when "an extraordinary and unforeseen emergency" requires the taking of the property at once by the commander.[20] That is the very distinction between such cases as Mitchell *v.* Harmony,[21] heretofore discussed, on the one hand, and U. S. *v.* Russell [22] on the other. In Mitchell *v.* Harmony the commander was not justified in what he did, because no situation of emergency existed; consequently there was no obligation on the government, and he remained liable as for a trespass. In U. S. *v.* Russell, on the contrary, where a commander during the Civil War used two vessels for a period, it was held that the government was under the obligation of payment, so of course the commander was not personally liable.

It is, then, a question of supreme emergency. Circumstances of that character justify the act of the soldier, for it is the act of the State. The nature and extent of the justifying exigency have never been entirely defined; we have only illustrations such as are afforded by the instances already mentioned. There are of course others.

[19] *Re* a petition of right, *supra.*
[20] U. S. *v.* Russell, *supra.*
[21] 13 How. 134; See Chapters V and VIII.
[22] *Supra.*

If for example, the citizen's property or person should be situated within the theater of active military operations, there can be no doubt, in the common law mind, that they are subject to the control of the commander in charge. He could forcibly remove the citizen's person from the scene of arms; he could do the like with the citizen's property; the latter, indeed, he could destroy if in his judgment such a course would best subserve his purposes of combat. All of this Coke has told us in the passages already quoted; but if more were needed, it is to be found in Ford *v.* Surget.[23] The plaintiff, a resident of the Confederacy, owned cotton whose situation, as the Confederate lines fell back, was brought ever nearer to the presence of the hostile Federal troops. The defendant, the local Confederate commander, finally ordered the cotton to be burned, in order to prevent its falling into the hands of the Union troops. For this, after the close of the war, he was sued by the plaintiff. The Supreme Court held for the defendant. Considering that the Confederacy was *de facto* a belligerent, the court treated the suit exactly as if a resident of Gettysburg had sued an officer of General Meade's army for destroying a Pennsylvania homestead in order to prevent its military use by General Lee's men. The property in each case, being in the theater of operations, was at the commander's disposal, and for no act of his with respect thereto was he liable, so long as it was done in good faith.

In the same category should be placed the situation which arose from the battle of New Orleans. On December 15, 1814, General Jackson declared martial law

[23] 93 U. S. 594.

over the territory ranging from four miles above the city to four miles south of it. The battle whose happy issue saved the city from capture, was fought on the eighth of the next month, but the General refused to relax his control until official advices reached him. Matters being thus situated, one Lovallier was taken into military custody for seditious language, and the civil court issued a writ of habeas corpus for him. General Jackson's answer was to arrest the judge. Then official news of peace arrived, and martial law ceased. The judge, on being released, fined General Jackson for contempt, and the fine was paid. Later, Congress passed an act to refund to the General the amount of the fine.[24]

From one point of view—the other being discussed in the following chapter—the decision of the Privy Council in *Ex parte* Marais [25] is also in point. There the petitioner, residing within thirty-five miles of Cape Town, was arrested and held for a military court on a charge of sedition. He was taken to a place three hundred miles distant for trial; but martial law had been proclaimed over all this territory, the Boer War then being in progress. The Privy Council held that the prisoner was not entitled to release by way of habeas corpus, although the civil courts were open in the affected territory. The court considered that war was raging over the entire section and that, therefore, martial law necessarily prevailed, the civil courts being open only on the commander's sufferance.

[24] A complete history of this case, with citations, appears in the arguments of counsel in *Exp.* Milligan, 4 Wall. 2.

[25] (1902) A. C. 109.

To this extent then, the Supreme Court is justified in the exception which it makes when, speaking of the rules applicable in times of peace to the relation of soldier and civilian, it pushes to one side, as not within the scope of its remarks, the "rule in time of war"—"whatever" it may be.[26] In time of war, let us repeat, the relation of soldier and civilian takes on an entirely different color according to the exigency imposed by the pressure of the conflict. But, beyond the demand of the occasion, the old restraints of the common law remain; its self abnegation goes just that far and no further. "It is an unbending rule of law that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires."[27]

Who is to judge of that? We had best answer that question with another. Who is to determine whether a case is within the jurisdiction of a court martial? We have already gained, it is to be hoped, not merely the answer to that question, but the philosophy of it. The common law must determine such matters. It can never turn away a suitor unless a case is non-justiciable; and whether such a case, on its facts, is of that class, the common law court alone must determine, for no other court or power can do so. The question must be determined; other courts are of limited jurisdiction, and in an English speaking commonwealth, executive or administrative powers are wholly non-judicial; and so the burden of this decision must fall on the common law court. Every act done to the person or property of the

[26] Bates *v.* Clark, 95 U. S. 204.
[27] Raymond *v.* Thomas, 91 U. S. 712.

citizen in time of war, therefore, must ultimately be submitted to the arbitrament of the common law; the question in each such case being whether an emergency existed which justified the measure as one of salvation for the State. Once that is determined in the defendant's favor, he goes free unless a case of express malice be shown. In that event, of course, the case is turned into one of oppression under color of office, and is actionable, it is submitted, on the same basis as a case of abuse of lawful process.[28] In the absence of such malicious abuse of power as "Flogging Fitzgerald" furnished during the Irish rebellion of 1798, the defendant goes free. But always must he be prepared to show the existence and nature of the emergency constituting his impulse to action, and it is for the court to say whether its judgment, in that regard, coincides with his.

The commander, therefore, goes through his arduous duties with the possibility of civil actions to greet him at the close of the war. It is a situation pregnant with injustice. If the defendant can show a situation of emergency of the nature above discussed, then he will be safe enough. But the soldier works under the double pressure proceeding from the duty of absolute obedience to orders, and, in war times, a feeling of responsibility for the national safety, that may well lead him to give orders not justified by any compelling emergency that later a common law court could fairly visualize. Yet the military man must act, although he knows that in the very decision he makes he is entailing litigation for himself upon the coming of peace. Hard indeed is his situation.

[28] See Wright *v.* Fitzgerald, 27 How. St. Tr. 751.

Recognizing this fact, legislative action in both England and America has taken a curious course, illogical in the extreme, but still so well established as to serve nowadays as a thing of precedent. This practice is to pass, at the close of a war whose effects have included collisions between the ordinary rights of citizens and the powers of the military, an act of indemnity. In England such statutes followed the Old Pretender's rebellion of 1715,[29] the Young Pretender's invasion of England in 1745[30] and the Irish rebellion of 1798.[31] As we have just seen, such statutes were not unknown to us prior to the Civil War; and the wane and close of that conflict were marked by two indemnity acts passed by the United States Congress.[32]

Such statutes are of two kinds. The first sort merely indemnifies a particular officer for damages which he might have been compelled to pay for a tort committed by him. Such was the case with General Jackson, following his military control of New Orleans during the War of 1812, which we have already mentioned, and such was the case with the famous Irish sheriff "Flogging Fitzgerald," after the jury had cast him in damages in Wright *v.* Fitzgerald.[33]

The other form of statute was embodied in the Civil War legislation just mentioned. For all acts done under the authority of army orders or regulations, a complete defence was provided. In short, these statutes "made the order of the President, or under his authority, a defence in all courts to any action for acts done or omitted

[29] 1 Geo. I, stat. 1, c. 39.
[30] 19 Geo. II, c. 20.
[31] 41 Geo. III, c. 66.
[32] Act. March 3, 1863, 12 Stat. 755; Act May 11, 1866, 14 Stat. 66.
[33] *Supra.*

to be done under or by virtue of any such order, or under color of any law of Congress."[34] They applied not merely to soldiers, but to all other persons acting under military direction, and so not merely did they protect civilian employees of the army,[35] but they also furnished to a debtor a complete defence against his creditor, in a case where a commander had, by way of requisition, collected the debt for the use of the army.[36] Nor was their application limited to mandatory orders. General orders, however permissive in scope, were also allowed as a defence; and this was necessary, for, as the Supreme Court said: "The orders of which the Acts speak are military orders, and a large proportion of such orders, it is well known, are merely permissive in form. They necessarily leave much to the discretion of those to whom they are addressed."[37] But in the absence of some sort of order, discretionary or mandatory, the officer was left as helpless as he would have been in the absence of any legislation at all, except for one thing. The statutes, for such cases, provided a short period of limitation within which any action of the sort must be instituted. If, however, the action should be instituted within the time limit nominated, then, the officer being able to point to no indemnity act, he would be cast in damages.

The working of this legislation is shown by McCall *v.* McDowell [38] which we have already discussed.[39] Of the two defendants sued, one had given the order, and the other had obeyed it, the final result being injury to

[34] Beard *v.* Butts, 95 U. S. 434.
[35] Beard *v.* Butts, *supra.*
[36] Mitchell *v.* Clark, 110 U. S. 633.
[37] Beard *v.* Butts, *supra.*
[38] 1 Abb. U. S. 212, Fed. Case 8673.
[39] *Supra,* Ch. VIII.

the plaintiff. The court held, as we have seen, that the plaintiff could not recover against the defendant who had executed the order, because he was protected, if not by the common law principles discussed in Chapters VIII and IV, then because the case came within the purview of the Indemnity Acts. But the plaintiff was allowed to recover against the defendant who gave the order, because he could not point to any order or regulation, direct or permissive, justifying his conduct, however meritorious in good morals it might have been.

This sort of *ex post facto* legislation carries on its face the suggestion that Congress might just as well have made it precede the acts in question, and thus have made them lawful from the first. The officer who acts under orders is left in the position of a wrong-doer until, after the event, an act of Congress legalizes what, until the enrollment of the statute, was a wrong. And although the statute does not validate the act as to the officer who created the direction under which his subordinate proceeded, yet it provides for his benefit a short period of limitations. And we are told that the object of abbreviating the period of limitation is that, if judgment should be recovered against the defendant, then, for his act, "if done under a necessity or mistake, the government should not see him suffer;" it following that the government may not merely provide for the removal of such suits into the Federal court, but may also prescribe a period of limitation.[40] This circumstance brings both classes of cases together. If, as to the officer acting under orders, Congress can, *ex post facto*, legalize what he has done, it can legislate in advance

[40] Mitchell *v.* Clark, *supra.*

that such acts shall be lawful. If Congress can pay out public money in indemnifying the officer who creates the order, for the amount of a judgment recovered against him, based on the order being carried into effect, then Congress may properly legalize such orders in advance, and thus keep public money in the treasury, or else pay the damage money direct to the injured party instead of standing as indemnifier for the officer.

There would seem to be no escape from these conclusions, nor has the Supreme Court made any determined effort at such an escape. It has upheld these statutes, and has admitted that, so far as legalizing acts done under order may be concerned, "most of these acts" Congress could have legalized in advance, though perhaps not all. That Congress can ratify an act which it could have authorized, "admits of no reasonable doubt," and as to acts which could not have been authorized, "who was to determine this question?"[41] This query in itself is hard to answer.

But as to justifying the payment of funds for the relief of an officer acting without order or authority from on high, we are left with merely the dogma enunciated in Mitchell *v.* Clark. The whole subject is in a most unsatisfactory condition; but at least we know that, logic or no logic, indemnity acts are constitutional.

The Supreme Court, however, spoke well when it allowed that many at least, of the acts which Congress had power to ratify, it had power to authorize in advance. The nature of those acts is well understood of both the common law and of history; but a discussion of this species must be reserved for the next chapter.

[41] Mitchell *v.* Clark, *supra.*

X

MARTIAL LAW AT HOME

We ascertained in the last chapter that, in the theater of actual conflict, the soldier's control over the civilian's property and person is complete, and that the commander is not liable for directing acts of domination so long as they were done under the pressure of actual hostilities. The idea thus embodied underlies the whole vexed proposition of which we are about to treat. Martial law at home, or as a domestic fact, to use the phraseology of the Government Manual for Courts Martial, is nothing but an application of the principle that gives legal immunity for military acts committed in a battle zone.

That principle is very simple. The commander is not liable civilly for acts committed in the pressure of battle, because the common law does not reign on a field of action. The reason for the municipal law's abdication in those circumstances lies in the fact that you cannot have law without courts for its enforcement; theoretically, perhaps, you may, but actually you cannot. And further, you cannot have courts, in the same pragmatic sense in which we have just spoken, unless they are free to execute their judgments or decrees. Back of every writ issued must lie the full power of the State, to be exerted, if necessary, in its execution, or else, from a common sense standpoint, it is no writ at all. Now if the State is not in a position to back up the execution of a judicial order because, in the territory where that

order is to have effect, if at all, the State's energies, represented in its army, are engrossed in a struggle with an armed enemy, then there is no effectual writ, and this deprives the court which issued it of the powers necessary for its functioning. And so, reaching back still further in our reasoning, we must conclude that, under such conditions, the municipal law, as to the territory affected by arms, has ceased to reign. Acts committed in such an area of war cannot be considered in respect to their character as violating rights conferred by the common law, because, the courts' writs not running freely in the zone of conflict, the common law does not prevail there. The law that has place is martial law, the rule of the commander, and he, as we have seen, is bound only by the obligations of his calling, the laws and customs of war. Nor would it alter things if the commander should permit the courts to remain open in such a zone; for in that case there is lacking the all-important requisite that the common law courts, to be courts at all, must be free, and their judgments must have back of them the whole power of the State, and not depend upon the fiat of the commander.

It follows, as a matter of course, that martial law prevails when the civil courts are closed, or remain open only under military sufferance; of this no doubt can exist, either in England or America.[1] It was for that reason that, after the conviction of Major André,[2] Washington was justified in bringing the civilian Joshua Smith, at whose house Major André had spent the night before setting out on his return to New York City, to

[1] *Exp.* Milligan, 4 Wall. 2, majority opinion.
[2] *Supra*, Ch. V.

trial for treason, before a military court sitting at Tappan.[3] That part of New York State was a debatable land, swept by the fringes of the opposing armies; and hence the military court was the only source of justice and sanction. The law administered was, therefore, in real truth, martial law; for there can be no common law, as such, without the unconditioned operation of common law courts.

Nor need the *locus in quo* necessarily be open country of field operations. It may just as well be a fortress in a state of actual siege; for in a siege of the old style the whole city constitutes in effect a field of battle. Martial law in a besieged fortress, therefore, can violate no conceivable principle of common law, because there can be no free civil courts in such a place, and hence there can be no state of common law to be superseded. To that extent the continental idea of the *état de siège* violates, in its primitive form, no principle of common law. The *état de siège*, as a legal proposition in all continental countries, goes back to a decree of the French Convention, which provides that the commander of a strong place may put in force a state of martial law from the time when the enemy appears at a certain distance from the outworks, and that martial law shall cease within the fortress after the enemy's besieging works have been destroyed. This decree was later confirmed by a law of the First Empire; and, re-embodied in a

[3] Trial of Joshua Smith, 2 Chandler's Criminal Trials, 187. In Smith's written defense, read before the court, is an amusing account of the reception he got from Washington when he was brought into the General's awful presence immediately after his arrest, 2 Chandler, 187. Smith was acquitted, for all that.

law of the Third Republic, is still of force in France.[4] Such a statute differs in nothing from the common law view except in point of precision. The French law defines, by reference to events, the precise moments when the state of siege commences and when it ends. The common law makes no such definition, but leaves the matter to the circumstances of the case. Which method is preferable in that regard is beside the point; in the essentials there is no difference. The French law fixes the point of beginning at the appearance of the enemy "1800 toises from the crest of the covered way;" the common law places it at the moment when the courts can no longer sit undisturbed and execute their process, a moment which perforce must arrive soon after the enemy, in the language of the classic siege, "opens trenches." But it would outrage no common law idea if a statute should fix the points of commencement and termination of the state of siege after the manner of the French law; and, as it happens, the Confederate Congress did pass substantially such a law at an early stage of the Civil War. As a result, the progress of McClellan's army up the Peninsula in 1862 is marked by successive proclamations of President Davis, putting one city or county after another under complete martial law.[5] Such practices necessitated military commissions for the trial of non-military offenders, and we find frequent mention of such courts in the annals of the Confederacy.[6]

[4] Decree of National Assembly of July 10, 1791; confirmed by law of December 24, 1811, and of July 10, 1871. See Birkhimer, Military Government and Martial Law, Appendix V. For regulations of force in a town during the state of siege, see Dicey, Law of the Constitution, 8th ed., p. 288.

[5] 1 Messages and Papers of the Confederacy, 219, *sq.*

[6] See Davis, Military Law, 3d ed., p. 303 n.

Up to this point there has been no difficulty and we encounter practically no dispute. Martial law, in short, prevails as of course in the field of fire, be it large or small; whether we have the case of a siege of a Vauban fortress, or the modern instance of intrenched lines extending for many kilometers, martial law, as of course, prevails within the region affected. We have now to deal with a more troublesome question, whether, in a common law country, it is possible to have a state of martial law in a domestic area which is not the seat of actual war.

We must all agree that certain extensions of the *état de siège*, made by French law, have no parallel in the common law. In the absence of statute, we can have no martial law during the period of mobilization, as is the case in European countries.[7] Our national constitution does not expressly recognize any power of Congress to extend, by statute, the principle of the state of siege to territory not affected by actual military operations. Nor does the constitution of any State allow for such a thing. Prior to its incorporation as a territory of our nation, Hawaii had a constitution which allowed for the declaration of a state of siege according to continental ideas, but it has not that constitution now;[8] indeed, in the constitutions of but four of our States is martial law, as we understand it, recognized even by implication.[9] And against all this we have, in every constitution,

[7] See, for a picturesque account of the proclamation of martial law in Berlin at the opening of the Great War, Gerard, My Four Years in Germany, 403.

[8] 15 Columbia Law Review, 178–179.

[9] Massachusetts, New Hampshire, Rhode Island and South Carolina, 15 Columbia Law Review, 179.

State and Federal, the full "constitutional guaranties" which found expression in the Petition of Right of the time of Charles I, and the Declaration of Rights of the Revolution of 1688, providing for indictment, trial by jury and the like—things which are the breath of the common law—and no provision for their supersession. With much show of force, then, may writers of a high type say that martial law has no place in the English constitution, and legalists of the type of Alexander H. Stephens denounce the very idea of martial law in any form.[10]

These writers admit that martial law once had a place in the laws of England, but assert that with the Petition of Right it departed, leaving no trace of its presence. So often, indeed, has that proposition been asserted, so often has it been passively accepted, that many people consider it well founded in historical truth as well as in judicial decision.

It is submitted that this proposition is wrong in both its concession and its conclusion. Martial law was never a part of the constitution of England, any more than it is a part of our law. Hence it made no departure from the English system at the time of the Petition of Right, for it was never a part of that system. But martial law, in one or both of its phenomena, is legally possible in England, just as it is constitutionally possible with us. Its appearance on the scene is not as a part of the municipal law, but as the State's supreme measure of self-defense. Constitutional theories in England, and written constitutions in our land, are designed to limit municipal law, in its extension or application; but they

[10] See citations *infra*.

have no reference to, and, therefore, do not exclude, the State's resort to martial law in defense of the very constitution itself. In that sense, and a very real sense it is, martial law is a part of our constitutional system, as will be demonstrated by the authorities presently to be cited.

But before introducing these authorities, let us see what martial law at home really means. Its main necessity consists in the disloyal acts of our own citizens. The acts of the alien enemy can largely be reached through the process of internment, and for war crimes he is, as previously suggested, subject to the jurisdiction of military courts; because being always beyond the peace of the State, he cannot object to the jurisdiction of the military courts to try him for any war crime he may commit.[11] The Eighty-second Article of War, making certain sorts of espionage triable by court martial [12] is chiefly valuable in its application to neutrals and citizens; the alien enemy's case does not require that statute to bring him within the jurisdiction of the military court. But the traitorous citizen, outside of acts coming within the scope of the Eighty-second Article, is not subject to the jurisdiction of a military court. Yet his acts, committed far behind the lines, may harmfully affect the national defense and inestimably aid the enemy.

So long as it can do so, the government will protect itself by the enforcement of the municipal law. Its powers, in that regard, may be exerted by way of prevention as well as punishment.

[11] *Supra*, Ch. VI.
[12] *Supra*, Ch. III.

It can, if it pleases, obtain in equity an injunction forbidding acts harmful to the operation of government.[13] If the acts amount to an obstruction of judicial process or of law and order, the army can be used for the enforcement of the law. In England it can be used in aid of judicial process, really by way of a *posse comitatus*.[14] The restrictions governing the use of our national forces in this connection have already been indicated,[15] but, when within the terms of those restrictions, the Executive can use the entire armed forces of the nation in defense of its laws; and that, too, without resort to any injunction in equity.[16]

In that regard, force can be used, and there is no liability to any of those who may suffer physical harm from the use of such force. The civil magistrate, indeed, is guilty of malfeasance of office if he does not use force when necessary. The Lord Mayor of London was thus convicted for his not using the troops to suppress the Gordon riots, whereas the mayor of Bristol was acquitted on a similar charge in connection with the Bristol riots of 1830.[17] In England, indeed, there is

[13] *Re* Debs, 158 U. S. 564, 15 Sup. Ct. Rep. 900.

[14] Burdett *v.* Abbott, 4 Taunt. 401.

[15] *Supra*, Ch. II.

[16] *Re* Debs, *supra*.

[17] Rex *v.* Kennett, 5 C. & P. 282; Rex *v.* Pinney, *id.* 254. "In 1780 . . . soldiers with arms in their hands stood by and saw felonies committed, houses burnt, and pulled down before their eyes, by persons whom they might lawfully have put to death, if they could not otherwise prevent them, without interfering; some because they had no commanding officer to give them the command, and some because there was no justice of the peace with them. It is the more extraordinary, because formerly the *posse comitatus*, which was the strength to prevent felonies, must in a great proportion have consisted of military tenants, who held lands by the tenure of military service. If it is necessary for the purpose of preventing the mischief, or for the execution of the law, it is not only the right of soldiers, but it is their duty to exert themselves in assisting the execution of a legal process, or to prevent any crime or

theoretically a condition precedent to the use of armed force, in the shape of a proclamation under the Riot Act,[18] but, in view of the determination that the magistrate may omit compliance with the statute in case of emergency,[19] we may take it that in England, as here, the magistracy may use the troops *instanter* for the suppression of obstructive acts.

These measures of prevention, it will be observed, make the army wholly ancillary to the civil power. The troops act at the bidding of the civil power; indeed they may not do otherwise. "The military officer," says Littledale, J.[20] "may act without any magistrate, but no prudent military man would do so, because his acting may be attended with the loss of life; but if a magistrate gives him an order to act, that is all that is required." This is, therefore, no sort of martial law, for the use of the military amounts to nought but the suppression of a riot. The civil arm inflicts physical harm by the use of the weapon it grasps, but none the less the act is the act of the civil power, and the acts suppressed are not acts of war or of rebellion.[21] Both "Shay's Rebellion" in Massachusetts, and the "Whiskey Rebellion" in Pennsylvania, in legal theory, differed in no way from the Gordon riots of 1780 or the reform riots which took place in Bristol; for in each of these

mischief being committed. It is, therefore, highly important that the mistake should be corrected, which supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights and duties of an Englishman." Sir James Mansfield, C. J., in Burdett *v.* Abbott, 4 Taunt. 401.

[18] 1 Geo. I, stat. 2, c. 5.

[19] Rex *v.* Pinney, *supra;* Report of Commissioners (including Bowen, L. J.) on the Featherstone Disturbances, printed in Dicey, *op. cit.* 512.

[20] Rex *v.* Pinney, *supra.*

[21] See *Re* Debs, *supra.*

"rebellions," if we may trust to the industry of Woodbury, J. [22] the military was wholly under the direction of the civil power.

Where the civil power has been in control in acts of prevention, it likewise controls in matter of punishment. Rioters taken by the troops are handed over to the local jailer, to be brought before a committing magistrate in the same course as of an arrest by a constable. The constitutional rights of the wrong-doers subsist throughout the drama.

But the seditious acts may be of such a nature as to put the civil magistracy wholly out of action. Its control may be wholly lost or so impaired as to be ineffectual for the government's protection. When that point is reached, and, therefore, the action of the military, in prevention or punishment, or both, is not controlled by the civil authority, then we have a state of martial law.

Martial law, in that connection, simply means a substitution of agencies for the accomplishment of but one end, the preservation of the State's supremacy. The municipal law, as we have just seen, has a choice of two methods, prevention and punishment. Martial law acts in exactly the same way. There are, in short, two kinds of martial law, the punitive type and the preventive.

Punishment is inflicted through the sentence of a military commission. A court martial, as such, would have no jurisdiction, inasmuch as the accused would not be members of the army, nor would all of them necessarily be alien enemies,[23] wherefore the military

[22] Dissenting opinion in Luther *v.* Borden, 7 How. 1.

[23] See Ch. III.

commission is the proper court for administration of the punitive type of martial law at home.[24]

The preventive method is of the simplest nature; it means either the forcible breaking up of assemblies, protecting public places by force, or removing the person of a wrong-doer to a place of restraint and keeping him there, without the warrant of any court. The latter thing cannot possibly be done in the absence of martial law; because all the offender would need do would be to sue out a writ of *habeas corpus*. This writ requires the production of the prisoner before a civil court, together with a return showing the cause of his detention. No cause recognizable at common law could be shown, and the court would, therefore, direct the discharge of the prisoner. It follows that there can be no martial law without a suspension of the writ of *habeas corpus*.[25]

Such are the two independent phases of martial law: First, prevention, including the suspension of the writ of *habeas corpus*, and, second, punishment, involving the trial and judgment of civilians by a military commission. This brings us to an examination of common law authorities regarding either system as a lawful possibility.

[24] A remark, such as was made by a respectable legal journal shortly after the Civil War, that the jurisdiction of military commissions "is at least of doubtful validity," 1 American Law Review, 389, is entitled to respect only on the charitable assumption that the writer was referring to martial law. A state of punitive martial law justifies the military commission as a matter of course, and the only question in such a case would be whether the circumstances justified martial law at all.

[25] *Exp.* Field, 5 Blatch. 63, Fed. Case 4761. "I have personally known an officer, who for the same reason, *i. e.*, to avoid service of *habeas*, never left Fort Lafayette, New York Harbor, for over a year and a half, when that enclosure was used for internment purposes during the Civil War." Judge Hough, Law in War Time, 31 Harvard Law Review, 698. Such embarrassments are bound to occur in the absence of a recognized state of martial law.

We may start with a general proposition. A permanent military government, our Supreme Court has declared, would not be of the republican type. But when used merely for a crisis, "and to meet the peril in which the existing government is placed by armed resistance to its authority," there is no constitutional objection to it.[26] In case of an insurrection "similar powers (of military control) may arise during the continuance of the necessity."[27] Martial law under those conditions, has fitly been called "a species of hostilities directed against individuals who have placed themselves in the position of enemies, and have, therefore, deprived themselves of all the safeguards which the constitution throws about the lives, liberty and property of citizens."[28] Obviously, then, martial law cannot exist in time of peace. Its function is to protect the State in time of deadly peril to the commonwealth; to use it in time of peace is, therefore, a flagrant case of lawlessness. Such is the simple proposition to be kept in view.

Now let us turn to history. English annals have not presented a uniform pageant of domestic peace. It is quite true that at an early date the common law established a sort of supremacy, but it was a supremacy over those who acknowledged the Crown's authority, and many there were who refused to do that.

Until the union of the Crowns of Scotland and England, the border along the Tweed was in so chronic a state of war and reprisal that a distinct code of laws

[26] Luther *v.* Borden, *supra.*

[27] 9 Halsbury's Laws of England, 104. Lord Halsbury, the editor of this encyclopaedia, delivered the judgment of the Privy Council in *Exp.* Marais, *infra.*

[28] Pomeroy, Constitutional Law, Sect. 711.

of war grew out of the armed relations between Southron and Scot.[29] But not merely on the border were there states of armed force. The condition of England during the Wars of the Roses is graphically shown in the Paston Letters; but even in the reign of Richard II we find record evidence of the then state of the times. The preamble of a statute of maintenance passed in 1378,[30] refers to the nuisance of roving bands of baronial retainers, who acted "as it were in a land at war."[31] This state of lawlessness, in contempt of the King's Courts and their process, a state "of which our strictly legal authorities disclose very little,"[32] continued until Tudor times, only to be succeeded by successive conditions of civil war and rebellion. The Tudors, strong of will and courage, withstood their enemies with armed force, and, arms being the recourse, very logically applied to their adversaries the law of the arbitrament to which they had appealed. Consequently martial law figures prominently in the reigns of Henry VIII and his two daughters, Mary and Elizabeth.

To a degree, there was logic, of the sort recognized by common law, in this use of martial law. But Mary and Elizabeth agreed in but one thing, and that was in an abuse of martial law, an abuse which lay in subjecting to military courts persons whose offenses had been committed in time of peace. Therein they paved the way for their Stuart successors to commit further abuses along this line.

[29] By way of passing interest the reader is referred to the chapter on "Border Law" in Mr. Watt's entertaining book, "The Law's Lumber Room." See also the Case of the Lords Presidents, 12 Co. Rep. 51.

[30] 2 Ric. II, stat. 1, c. 6.

[31] See Jusserand, English Wayfaring Life in the Middle Ages, 149, *sq.*

[32] Pollock, Genius of the Common Law, Ch. IV.

On Henry's reign we have the evidence of Coke. In the Case of the Lords Presidents [33] he tells of the various risings which resulted from the King's ecclesiastical policy, particularly the great Rising of the North. "Many of these rebels were executed *in furore belli* and *in flagrante crimino* by martial law, and some were attainted by the common law." This application of martial law, in a district forming a seat of war, is not so strange to the present-day mind. Nor did Henry's daughters wholly ignore the distinction between times of peace and times of war; but they abused the proposition until its original application was almost forgotten. Bacon was possibly right in his statement that Elizabeth could have put the Earl of Essex before a military court because of his conspiracy, if the State was thereby put in a state of extreme peril;[34] but the Tudor sisters went beyond that. The method they adopted was, by the simple process of declaring their acts to be turbulent and rebellious, to put offending citizens within the jurisdiction of military courts.

Pursuant to this reasoning, Queen Mary proclaimed that "whosoever had in his possession any heretical, treasonable, or seditious books, and did not presently burn them, without reading them or showing them to any other person, should be esteemed a rebel, and without any further delay be executed by the martial law."[35] Elizabeth's performances were even more bizarre. That eighteenth century Liberal, Hume, says of her reign, that "whenever there was any insurrection or public

[33] 12 Co. Rep. 51.

[34] See Hume, *infra*.

[35] Tytler, Military Law 50; see dissenting opinion of Woodbury, J., in Luther *v.* Borden, *supra*.

disorder, the Crown employed martial law; and it was during that time exercised not only over soldiers, but over the whole people; any one might be punished as a rebel or an aider and abettor of rebellion, whom the provost-martial or lieutenant of a county, or their deputies, pleased to suspect."[36] The distinction between peace and war was of little importance to the Queen. Thus, one Burchett, a Puritan, became inspired with the idea that no one but those of his sect ought to live; wherefore, proceeding to the street, he attacked the first man he met, who happened to be the famous Hawkins, the Admiral. This so incensed Elizabeth against the Puritan, "that she ordered him to be punished immediately by martial law; but upon the remonstrance of some prudent councillors, who told her that this law was usually confined to turbulent times, she recalled her order and delivered over Burchett to the common law."[37] We have, however, a more extreme instance, where Elizabeth, finding the common law courts and star chamber unable to suppress assemblies of "idle vagabonds and riotous persons" in the streets and purlieus of London, issued a commission of provost martial to Sir Thomas Wilford. This commission directed the provost-martial, "upon signification given by the justices of the peace in London or the neighboring counties, of such offenders worthy to be speedily executed by martial law, to attach and take the same persons, and, in the presence of said justices, according to justice of martial law, to execute them upon the gallows or gibbet openly, or near to such place where the said rebellious

[36] Hume, History of England, Appendix III.

[37] Hume, *op. cit.*

and incorrigible offenders shall be found to have committed the said great offenses." [38]

Yet during those very days of abuse Coke was writing, as a plain expression of the common law view, that "if a lieutenant, or any other that hath commission of martial authority *in time of peace* hang or otherwise execute any man by color of martial law, this is murder." [39] Coke, afterwards one of the authors of the Petition of Right, knew the true line of distinction; he knew that the difficulty with the actions of Mary and Elizabeth was that they overlooked the distinction between times of peace and conditions of war.

Then we have Stuart times. Charles I brought matters to a head by quartering soldiers in Plymouth, and putting the County of Devon under martial law, all in a state of profound peace. As a result came the Petition of Right.[40] Its effect, according to a great authority, is "that the exercise of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. This is in substance declared in the Petition of Right, 3 Car. 1, whereby such commissions and martial law were repealed and declared to be contrary to law." [41] To the same effect writes Selden, who participated in the debate when the Petition of Right was before the House of Commons. "Martial law in general," he says, "means nothing but the martial law of this or that place; with us to be

[38] Hume, *op. cit.*

[39] 3 Coke's Institutes 52.

[40] As first drafted, the Petition condemned only billeting. Gardiner, History of England, vol. 6, p. 275.

[41] Hale, History of the Common Law, 5th ed., vol. 1, p. 55.

used *in furore belli*, in the face of the enemy, not in time of peace; there they can take away neither limb nor life. The commanders need not complain for want of it, because our ancestors have done gallant things without it."[42]

Thus we find Coke, who wrote before the Petition of Right was framed, and who drew it, Selden, who participated in the debate upon it, and Hale, who wrote in the succeeding reign, uniting in saying that there can be no martial law—but when? "In time of peace."

Finally let us turn to the words of the document itself. "The framers of the Petition of Right," says Lord Halsbury, L. C.[43] "knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure." Sir Frederick Pollock, the reporter, adds this foot-note to that decision: "It is a matter of historical fact that there was not any state of war at the times and places of the acts complained of. The words 'time of peace' are familiar in the Mutiny (now Army Annual) Act, but do not occur in the Petition of Right."[44] Lord Halsbury's language, therefore,

[42] Selden, Table Talk, 2.

[43] *Exp.* Marais (1902) A. C. 109.

[44] Footnote to report of *Exp.* Marais (1902) A. C. at p. 116. The applicable portions of the Petition are thus quoted in the same footnote: "The preamble states that commissions have issued under the Great Seal 'by which certaine persons have been assigned and appointed Commissioners with power and authoritie to proceed within the land according to the justice of martiall lawe against such souldiers or marriners or other dissolute persons joyning with them' as therein mentioned, 'and by such summary course and order as is agreeable to martiall lawe and as is used by armies in tyme of warr to proceed to the tryall and condemnacion of such offenders, and them to cause to be executed and putt to death according to the lawe martiall. By pretext whereof some of your Majesties subjects have been by some of the said Commissioners put to death, when and where, if by the lawes and statutes of the land they had deserved death, by the same lawes and statutes alsoe they might and by no other ought to have byn judged and executed'. Also that offenders have escaped punishment in ordinary course of law 'upon

is by way of inference rather than of quotation; but, in the light of all that has been said, it is submitted that the Petition of Right can be read only as the Lord Chancellor read it.

Much has been written on the subject. The decision in *Ex parte* Marais,[45] of which more will be said presently, evoked a most valuable symposium of articles in the English Law Quarterly Review.[46] The subject has also been treated exhaustively by American writers, to whom the reader is referred.[47] Some, like Professor Dicey, claim that, in England at least, there can be no use of the military, independently of civil control. Other English writers argue that martial law survived the Petition of Right as a measure of extreme self-defense. The American writers agree that martial law exists with us, but whether in both aspects of prevention and pun-

pretence that the said offenders were punishable onelie by martiall lawe and by authoritie of such commissions as aforesaid, which commissions and all other of like nature are wholly and directlie contrary to the said lawes and statutes of this your realme'. The two concluding prayers of the Petition are as follows: 'And that the aforesaid commissions for proceeding by martiall lawe may be revoked and annulled. And that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesties subjects be destroyed or put to death contrary to the lawes and franchise of the land'. It is matter of historical fact that there was not any state of war at the times and places of the acts complained of. The words 'time of peace' are familiar in the Mutiny (now Army Annual) Act, but do not occur in the Petition of Right.—F. P."

[45] *Supra.*

[46] 18 Law Quarterly Review, 152, *et seq.* Articles by Sir Frederick Pollock and others; Dicey, Law of the Constitution, 8th ed., chapter on Martial Law, and Appendix.

[47] *e. g.*, the chapter on Martial Law in Davis, Military Law, 3d edition; Birkhimer, Military Government and Martial Law; also articles by Professor Ballantine, 12 Columbia Law Review, 529, and 24 Yale Law Journal, 189; Col. Clabaugh, 7 Illinois Law Review, 479; Judge Cullen, 48 American Law Review, 345.

ishment is of doubt to them. The English writer, H. Erle Richards,[48] alleges that one element cannot exist without the other; that there can be no preventive martial law without a co-ordinate jurisdiction of military courts to punish infractions of the rules established by the military control.

It is believed that all these points are met by the facts of the history leading up to the Petition of Right, by the accepted practice since then, and by the decisions of the courts. These factors give us certain clear results: *First*, that the Petition of Right had nothing to do with the preventive type of martial law, and, so far as that type is concerned, the history just narrated does not affect its constitutionality. *Second*, that the Petition of Right, so far as it condemned the punitive feature of martial law, related only to its use in time of peace, when common law process naturally should have full sway.

Preventive martial law has been used in both England and this country, and upheld by the courts. Nor is this contrary to any reading of the Petition of Right, because that document does not refer to the preventive aspects of martial law. Its denunciation is only of the jurisdictional side; it proscribes military courts, but it says nothing of any feature of preventive measures.

In the century following that of the Petition, England used preventive measures with great effect. The civil courts were wide open, yet, by legislative action, offenders of a certain class were deprived of their liberty by military force, and forbidden recourse to the writ of *habeas corpus*. All of this occurred during the war with

[48] 18 L. Q. Review, 139.

revolutionary France. In 1794 Parliament passed a law,[49] which was continued by re-enactment for seven years, and then followed by the Indemnity Act to which we have elsewhere referred.[50] This statute, after reciting the prevalence of treasonable conspiracies "for subverting the existing laws and constitution," provided that any person arrested under a warrant signed by the King and six Privy Councillors or by a Secretary of State, for "treasonable practices" shall be held for one year "without bail or mainprize," and that no judge or court shall release him, any law to the contrary notwithstanding. This, Lord Shaw has recently said [51] "was plain language: it followed constitutional practice: for some months and in defined cases the Constitution was suspended."

The present war furnished an even more striking example. The Defence of the Realm Act, 1914 [52] provided three things of interest to us: (1) It authorizes the internment of any person, whether British subject or not, who is "of hostile origin or associations," on the recommendation of a competent military authority. (2) As amended by a later act,[53] the statute allows the trial by court martial of any civilian accused of treasonable practices or acts of espionage, unless within five days after his arrest, the accused demands a jury trial in a civil court; but such a trial must be in secret if the Crown so requests. (3) But even this right of jury trial may be suspended by proclamation, as to any area

[49] 34 Geo. III, c. 54.
[50] 41 Geo. III, c. 66; Dicey *op. cit.* 231.
[51] Rex *v.* Halliday (1917) A. C. 260; 116 L. T. 417.
[52] 5 Geo. V, c. 8.
[53] March 16, 1915, 5 Geo. V, c. 34.

designated in the proclamation, "in the event of invasion or other special emergency arising out of the present war." In any such proclaimed area the trial of accused traitors would necessarily be by court martial, and so a regulation, framed under the Act, prescribes.[54] The whole of Ireland was so proclaimed by Proclamation of April 26, 1916.[55]

Such is the statute now of force in a land where, according to some writers, domestic martial law is impossible! True, many points dear to the legalist are saved. The writ of *habeas corpus* is not literally suspended as against an interned person; he can have it, but the civil court, after reading the return, would have to dismiss the writ.[56] True, a liege accused of treason may have a trial in a civil court, but he must demand it within five days, and even that trial must be secret, if the prosecution so requests. And finally, while the judgments of courts martial are nowadays reviewable by the Court of Criminal Appeal,[57] that is poor consolation to the legalist in view of the statute's authorizing the Crown to put whole areas of Britain under real martial law whenever, in its judgment, the exigencies of the war require that recourse. Where are now the theories of yesteryear?

Most fully, too, has that statute been upheld by the majority of the House of Lords in the recent case of Rex *v.* Halliday,[58] which arose on an interned subject's application for a writ of *habeas corpus*. Technically, of

[54] Reg. 55d; Official Publication of May, 1917, p. 7.
[55] Off. Pub., *supra*, p. 7.
[56] See opinion of Lord Atkinson in Rex *v.* Halliday, *supra*.
[57] *Supra*, Ch. III.
[58] *Supra*.

course, the court could not declare the statute void; but the law lords seemed to think that they could, if they pleased, annul the operative regulations established under the statute. This they declined to do, holding that nothing in these regulations offended against English constitutional theories. The reasoning of Lord Atkinson is particularly to be commended. He points out that it is no new thing in common law for a citizen to be deprived of liberty or even property if he comes within a certain prescribed class. In such a case, the citizen has his day in court on the question whether he comes within the class in question. If it be determined that he does, he stands convicted just as if he had been convicted as a murderer, and no further question remains for the common law court to decide. That the legislature may, within certain limits, create such classes, cannot be doubted. As an example, he cites the well settled practice of requiring common disturbers to give bail to keep the peace, and be imprisoned until such bail is furnished—a practice which goes back to 1360.[59] To this we may add the example afforded by the statute of Winton,[60] which authorizes the watch of any town to arrest "night walkers" and hold them in the town jail until full day.[61] To such lengths does sound common law go for the good of the State; and Lord Atkinson's opinion has in it no element of novelty except for those whose constitutional theories lack a background, not merely of history, but of the plainer facts of every-day practice.

[59] Stat. 34 Edw. III, c. 1.

[60] 13 Edw. I, stat. 2, c. 4.

[61] See 15 Vin. Abr. 555; title "Night Walkers."

Turn we now to our own country. We may pass over the abuse of martial law of which General Gage in Boston and certain royal governors were guilty, of all of which the dissentient Justice Woodbury fully informs us in Luther *v.* Borden,[62] and come at once to that celebrated case. The action originated in the United States Circuit Court of Rhode Island, being founded on diversity of citizenship. The plaintiff, a citizen of Massachusetts, sued the defendants, citizens of Rhode Island, for trespass for entering his house. The defendants justified under a declaration of martial law, made by the State's legislature. The defendants were members of an infantry company, and were ordered to arrest the plaintiff, and if necessary to break into and enter his dwelling. The court held for the defendants. The points of the decision were these:

1. A permanent military government is not republican. But when intended merely for a crisis, "and to meet the peril in which the existing government is placed by the armed resistance to its authority" it is lawful.

2. The test is whether the armed insurrection is too "powerful to be controlled by the civil authority."

3. The decision of this question of fact is with the State, rather than the courts. "The State itself must determine what degree of force the crisis demands."

4. The methods used are then of war, and governed by the laws and usage of war.

It will be observed that martial law was presented in Luther *v.* Borden solely in its preventive phase; the question simply being whether the plaintiff could be arrested.

[62] *Supra.*

The next case in the order of history presented, on its facts, no question of martial law at all; but the dicta in it are of the greatest value. These dicta, however, let us reserve for the last, taking the case as merely dealing with a national statute providing for martial law of the preventive kind. We refer to *Ex parte* Milligan.[63]

On March 3, 1863, the United States Congress adopted a law [64] which authorized the President to suspend the writ of *habeas corpus* as to classes of disloyal persons, and in territories, to be designated by him. The writ being suspended as to persons of a designated class, they, of course, could be put under military arrest on an Executive warrant, and thus kept without interference by any civil court. But the statute also required that lists of all such persons who were citizens of States in which the administration of the laws had continued unimpaired in the Federal courts, should be furnished by the Secretary of State and Secretary of War to the judges of the Federal courts. In case the grand jury in attendance upon such a court should terminate its session without indicting any such prisoner, the court should discharge him on bail to keep the peace, or to appear, to be further dealt with according to law. In case of default in the furnishing of such a list within twenty days after the time of arrest, the prisoner might after the termination of a session of the grand jury without indictment, obtain an order of discharge. This statute was followed by a proclamation [65] placing in a proscribed class, among others, all "aiders or abettors

[63] 4 Wall 2.
[64] 12 Stat. 755.
[65] 13 Stat. 734.

of the enemy," and persons committing any "offense against the military or naval service."

The petitioner, a resident of Indiana, was arrested on October 5, 1864, by order of the general commanding the military district of Indiana; and on October 21, he was placed on trial before a military commission convened by that general's order. The charges were conspiracy, affording aid and comfort to the enemy, inciting insurrection, disloyal practices, and violation of the laws of war. The specification was that the petitioner joined and aided a secret society, known as the Order of American Knights, or Sons of Liberty, for the purpose of overthrowing the government, holding communication with the enemy, conspiring to seize munitions of war, etc., and resisting the draft. He was convicted and sentenced to be executed on May 19, 1865. On May 10 he applied for a writ of *habeas corpus*. The judges of the United States Circuit Court being divided in opinion, the case was certified to the Supreme Court. The court held that the prisoner was entitled to his discharge. The judges differed radically in opinion on certain points which we will hereafter note; but the actual decision, in which all concurred, was that the statute governed the situation. The statute had not been complied with, inasmuch as Milligan's name had not been furnished to the local Federal court, and, the grand jury of that court having completed its session without indicting him, the petitioner was entitled to an enlargement from his prison without consideration of any other point. The actual decision then is that, in the absence of special circumstances, the presence of a statute providing for preventive measures excludes the exercise, by execu-

tive authority or otherwise, of the punitive phase of martial law.

So far as the preventive feature of martial law is concerned, however, no statute is necessary. If any doctrine can be said to be clearly settled in this country at the present day, it is that the State has the power to do two things. First, it may determine whether there is the necessity for declaring a state of martial law, and this determination is an act of state which cannot be judicially reviewed. This judgment having been formed, the State may put it in force by the use of preventive measures of the kinds already mentioned, protection of property and works, dissolution of mobs, and detention of persons;[66] and all of this free from the direction of the civil authorities or review by the courts.

That this may be done by the governor of a State is clearly settled by American authority;[67] whatever may have once been the conception of the law in England, that, at least of late years, has become our law.[68] Nor does the governor's exercise of this power infringe any rights guaranteed by the Federal constitution. Such was the decision, as we saw, in Luther *v.* Borden,[69] but certain theories ingerminated by the majority opinion

[66] In Hatfield *v.* Graham, 73 W. Va. 509, 81 S. E. 533, this power was extended to the suppression of a seditious newspaper.

[67] Nance *v.* Brown, 71 W. Va. 519, 77 S. E. 243; *Exp.* Jones, 71 W. Va. 567, 77 S. E. 1029; *Exp.* McDonald, 49 Mont. 454, 143 Pac. 947; Com. *v.* Shortall, 206 Pa. St. 165, 55 At. 952; *Re* Boyle, 6 Idaho 609, 57 Pac. 706; *Re* Moyer, 35 Colo. 159 85 Pac. 190. In some States statutes authorize the judge of any superior court to exercise the same power. See Ela etc., *v.* Smith, 5 Gray 121; People *v.* Bard 209 N. Y. 304, 103 N. E. 140.

[68] Professor Ballantine, writing in 1912, considers that there is a difference in this respect, between the English and the American view. 12 Columbia Law Review, 529.

[69] *Supra.*

in *Ex parte* Milligan,[70] of which hereafter, led to a fresh challenge of the proposition. But in Moyer *v.* Peabody [71] the question was settled once for all. That was an action for false imprisonment, the defendants being the former governor of Colorado, the former adjutant general of the Colorado national guard, and a captain in a company of the national guard. The complaint alleged that the defendants justified the imprisonment under the constitution of Colorado, which made the governor commander in chief of the State forces, and gave him power to call them out to execute laws, suppress insurrection and repel invasion. The governor had declared a county to be in a state of insurrection, had called out the militia, and had ordered the military arrest of the plaintiff as a leader of the outbreak, directing that he be detained until he could be released with safety. The court held, on demurrer, that this complaint stated no cause of action. The court said that the governor had power "to kill persons who resist, and, of course, to use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace." Then Holmes, J., who spoke for the court, gave the whole philosophy of the matter in these words:

> Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief. . . . No doubt there are cases where the expert on the

[70] *Supra.*

[71] 212 U. S. 78, 29 Sup. Ct. Rep. 235.

spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. That is the position of a captain of a ship. But, even in that case, great weight is given to his determination, and the matter is to be judged on the facts as they appeared then, and not merely in the light of the event. . . When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. . . This was admitted with regard to killing men in the actual clash of arms; and we think it obvious, although it is disputed, that the same is true of temporary detention to prevent apprehended harm. As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the governor to deprive citizens of life under such circumstances was consistent with the Fourteenth Amendment, we are of opinion that the same is true of a law authorizing by implication what was done in this case.

The same proposition applies to the Federal government. In the enforcement of the peace of the republic, it can use all the force it can command. If it chooses it may resort to the mild measure of a suit in equity, terminating in a writ of injunction against the disturbers. But in *Re* Debs [72] where that holding was made, the court was careful to say that any such remedy was but cumulative. Whatever a State of the Union can do in the protection of its right of existence, the government also can do.

It only remains to deal with two questions.

[72] *Supra.*

The first, is whether preventive martial law, or qualified martial law, as it is styled in one of the decisions upholding its use,[73] can be established merely by executive order. In the decisions of State courts already discussed, this power was uniformly of executive exercise, and upheld as such. It is not so clear with the Federal government. An able authority [74] argues that such power belongs only to the Executive, as a war power of necessary implication. That does not carry us far, because Congress also has war powers; and, so far as decisions go, they favor the location of this power with Congress.[75] These decisions are in line with the opinion of Professor Dicey, who justifies an act of indemnity as a legislative act legalizing a state of martial law, and, therefore, *ex post facto* ratifying it.[76] It follows, of course, that the legislature may establish martial law, which leaves little room for the view that martial law is foreign to the English constitution.

The remaining question is whether the punitive feature of martial law may constitutionally be established. This was the feature that was explicitly named in the Petition of Right. The preventive aspect was not so named, and, as we have seen, martial law to that extent is part of our system and that of England. Is the punitive feature forbidden?

There is authority for the contention that punitive martial law cannot be established outside of the thea-

[73] Com. *v.* Shortall, *supra.*

[74] 2 Hare, Constitutional Law 968; see *contra* Birkhimer, *op. cit.* 38.

[75] *Exp.* Field, 5 Blatch. 63, Fed. Case 4761; *Re* Winder, 2 Cliff 89, Fed. Case 17867; Jones *v.* Seward, 40 Barb. 563. *Exp.* Merryman, Taney 246, Fed. Case 9487, should not be considered an authority, because, just as in Wolfe Tone's Case (*supra*, Ch. V) the army was not heard.

[76] Dicey, *op. cit.* 233.

ter of war. To that effect was the *obiter* portion of the majority opinion in *Ex parte* Milligan;[77] the test they suggested being whether, at the time of the proclamation, the civil courts were open in the region affected. On the other side of the border Alexander H. Stephens was declaiming to the same effect. Objecting to the Confederate statute allowing complete martial law in theaters of war, Mr. Stephens declared that "Congress may suspend the writ of habeas corpus, but that is the utmost to which they can go."[78] But the force of Mr. Stephens' objection was weakened by his later conduct. In February of 1864 the Confederate Congress, on the recommendation of President Davis [79] passed a statute somewhat similar to that involved in the Milligan case. Thereupon Mr. Stephens led the chorus of denunciation, despite the fact that a congressman from his own State had introduced the bill.[80] But such as it was, we have Mr. Stephens' earlier opinion in favor of preventive martial law, but denouncing the punitive variety. In recent years a State court has decided that very point;

[77] *Exp.* Milligan, 4 Wall. 2.

[78] Pendleton, Life of Stephens, 296.

[79] 1 Messages and Papers of the Confederacy, 395.

[80] See Pendleton, *op. cit.* 313; Cleveland, Life of Stephens, 761; Fielder, Life of Joseph E. Brown, 281; Stephens, War between the States, vol. 2, 778; Correspondence of Brown, Stephens, *et al*, Annual Reports of American Historical Society, 1911, vol. 2, 633, *sq.* The bill was ably defended by Benjamin H. Hill of Georgia, later United States Senator (Correspondence, *supra*, 635). Contemporary opinion of Brown and Stephens, held by those responsible members of the Confederacy who dealt with realities instead of shadows, was picturesquely expressed by Gen. Howell Cobb in Correspondence, *supra* 640. The attitude of Brown and Stephens on this subject induced General Sherman to invite them to consider a suspension of arms on Georgia's part—a separate peace, as it were. Governor Brown hotly declined the invitation, but Mr. Stephens' reply was of a more temperate, if not temporizing variety (Pendleton, *op. cit.* 323–324).

preventive martial law is possible with us, but punitive never, except when the civil courts are closed.[81]

Yet during the Civil War punitive jurisdiction became apparent. The commanders of certain districts, under direction of the Executive, established military commissions and put persons before them for trial as traitorous or seditious offenders against the laws of war.[82] The copperhead, Vallandigham, was tried before such a commission in Ohio, in 1863. Instead of testing the validity of the proceedings by *habeas corpus*, as did Milligan, Vallandigham applied to the Supreme Court for a writ of *certiorari*. This was refused, for reasons which, discussed elsewhere,[83] do not touch the point of present interest. Nor did Milligan's case really present the point, as we have already seen. Nevertheless, the majority of the court, in the Milligan case, proceeded to express themselves against the validity of martial law in any territory where the civil courts were open.

This dictum, concurred in by five [84] out of the nine justices, stung the chief justice and three of his associates [85] into a most strenuous counter-dictum. While the instant case was governed by the act of Congress in force, Congress, had it so pleased, could have gone much further. "What we do maintain is," said these four dissentients, "that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of

[81] *Exp.* McDonald, 49 Mont. 454, 143 Pac. 947.

[82] The first commission was established by General Fremont in St. Louis in the autumn of 1861. Davis, Military Law, 3d ed., 308 n.

[83] *Exp.* Vallandigham, 1 Wall. 243; *supra* Ch. IV.

[84] Davis, Nelson, Clifford, Field, Grier, J. J.

[85] Chase, C. J., Wayne, Swayne and Miller, J. J.

Congress to determine in what States or Districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army, or against the public safety."[86]

There, it is submitted, is the sound view. Punitive martial law was denounced in terms by the Petition of Right; but that pronouncement looks back to history. The history we have already examined shows that the abuse at which the Petition was aimed was the unnecessary use of the military courts, and that the test of necessity lay entirely in whether conditions of war existed. "In time of peace"—that was the test. But when war is flagrant, and a portion of the country is endangered by acts of war, then it does not violate any historical consideration to put military courts in control of vindicatory justice so far as it may apply to acts endangering the operations of the nation's armed forces. The fact that the culprit may be a citizen of ours should not shield him. In the moment of public danger his constitutional rights must yield to the peril, threatening the constitution itself, for in a situation of that sort the army constitutes the last bulwark of the State, and, therefore, of the Constitution. Such, in essence, is the minority's reasoning in *Exp.* Milligan.

The point discussed in these dicta and counter-dicta remained undetermined until the Boer War brought in its train a square decision of the Privy Council. This, the highest court of appeal for the British Empire—outside of England, Scotland and Ireland, whose ultimate appellate court is the House of Lords—had to deal

[86] *Ex parte* Milligan, *supra.*

with the same question of punitive martial law that the judges discussed in the Milligan case. In *Ex parte* Marais[87] the petitioner, a British subject, was taken into military custody, for trial by court martial. He was arrested at his home, thirty-five miles from Cape Town, and carried a distance of three hundred miles to Beaufort West. This was in the latter part of 1901, long after the relief of Ladysmith and the other border fortresses; and the war was then in a guerilla stage. Martial law had been proclaimed over the district in which the petitioner was arrested, and also that to which he was removed, but the civil courts were open. The petitioner's application, by way of *habeas corpus*, being refused, he petitioned the Privy Council for leave to appeal. The court denied the petition in an opinion which said that "where actual war is raging acts done by the military authorities are not justiceable by the ordinary tribunals."

That is true, but it seems questionable whether three hundred miles of Cape Colony could accurately have been described in 1901 as a theater of actual operations. On the language of the opinion the case belongs to a category we discussed in Chapter IX; on its facts, and in its general acceptation,[88] this case adopts the view taken by the minority in the case of Milligan. And although the decision in *Ex parte* Marais does not obtain as law in England, Scotland and Ireland, yet the provision of the Defence of the Realm Act, 1914, already mentioned, permitting the government to proclaim complete martial law, punitive as well as pre-

[87] 1902 A. C. 109.

[88] See the symposium in the eighteenth volume of the Law Quarterly Review, cited *supra*.

ventive, in any area exposed to danger, shows that the Parliament, whose predecessor presented the Petition of Right, now construes that document as applying only to the use of martial law in time of peace. The minority opinion in the Milligan case has thus, in the fulness of time, received acceptation within all the bounds of the British Empire.

Our legislation in the present war, in the shape of the Espionage and Trading with the Enemy Acts, has made indictable crimes, triable in the civil courts, of many acts such as those dealt with in cases like Vallandigham's and Milligan's.[89] But enough has been said, it is hoped, to show that it is wholly immaterial whether a criminal statute covers the hostile acts in question. Criminal statutes are for the criminal courts, whereas the very proclamation of martial law means that a situation exists which criminal courts cannot handle. The question, in any such case, is simply whether the government is powerless, because of fancied limitations inherent in our Constitution, to take the necessary steps to protect the Constitution itself. It can hardly be doubted that, in any such case, the view of the minority in the Milligan case, will prevail. Opposition to that view rests on superstition rather than sound tradition; and superstition is not a part of the common law, of whose very life is historical truth.

[89] See article in the Forum, February, 1918, by Hon. Wm. H. Lamar, Solicitor to the Post-office Department.

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